

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-1311

United States Court of Appeals

FOR THE SECOND CIRCUIT

Case No. 74-1311

B

SCENIC HUDSON PRESERVATION CONFERENCE, THE HUDSON RIVER FISHERMEN'S ASSOCIATION, INC., THE SIERRA CLUB and its ATLANTIC CHAPTER, and THOMAS R. LAKE,

Plaintiffs-Appellants-Appellees,

—against—

HOWARD H. CALLAWAY, individually and as Secretary of the Army, Department of Defense, U.S.A., LT. GENERAL WILLIAM C. GRIBBLE, individually and as Chief of Engineers, Corps of Engineers, U.S. Army and COL. HARRY W. LOMBARD, individually and as District Engineer, New York District, Corps of Engineers, U.S. Army,

Defendants-Appellees,

—and—

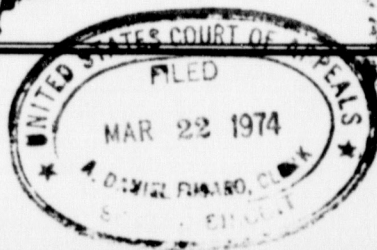
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendant-Appellant.

CROSS APPEALS

JOINT APPENDIX

(Attorneys' Names on Inside Cover)



PAGINATION AS IN ORIGINAL COPY

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Order to Show Cause

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 4276

[CAPTION OMITTED]

Upon the annexed motion for preliminary injunctive relief, the complaint herein, and the annexed affidavit of Albert K. Butzel, Esq., it is

ORDERED, that the defendants and each of them show cause at a Motion Term of this Court, to be held in Room 2903 of the United States Courthouse, Foley Square, New York, New York on the 19th day of October, 1973, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why this Court should not grant the preliminary injunctive relief requested in the motion papers herein; and it is

FURTHER ORDERED, that copies of this Order to Show Cause and the papers upon which it is granted, be served upon the defendants forthwith but inability in good faith to obtain such service promptly upon any of the defendants shall not operate to stay or postpone said show cause hearing as to defendants who are served with this order prior to such hearing.

Dated: October 9, 1973
New York, New York

MORRIS E. LASKER
U.S.D.J.

Motion for Preliminary Relief

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

Plaintiffs, by their attorneys, Berle, Butzel & Kass, move this Court, pursuant to Rules 7(b) and 65 of the Federal Rules of Civil Procedure, for a preliminary injunction:

A. Enjoining defendant Consolidated Edison Company of New York, Inc., and all of its employees, agents, servants, or other persons acting for it, from commencing construction of, and undertaking any dredge or fill operations in connection with, said defendant's planned pumped storage water power project (the "Project") at Storm King Mountain on the Hudson River in Cornwall, New York; and

B. Enjoining defendants Howard H. Callaway, individually and as Secretary of the Army, Lt. General William C. Gribble, Jr., individually and as Chief of Engineers of the U.S. Army, and Colonel Harry W. Lombard, individually and as District Engineer, New York District, of the Corps of Engineers of the U.S. Army, from their continuing failure and refusal to enforce in respect of the Project, and to hold defendant Consolidated Edison Company to compliance with, the permit requirements for dredge and fill operations established by Section 10 of the Rivers and Harbors Act of 1899 [33 U.S.C. §407] and Section 404 of the Federal Water Pollution Control Act, as amended [33 U.S.C. §1344].

Motion for Preliminary Relief

This motion is made on the grounds that:

1. Unless restrained by the Court, defendant Consolidated Edison Company will shortly commence construction of, and undertake dredge and fill operations in connection with, the Project.

2. Unless restrained by the Court, defendants Callaway, Gribble and Lombard, will continue to fail and refuse to enforce, and to hold Consolidated Edison Company to compliance with, the statutory permit requirements cited above.

3. Said actions by defendants are in clear violation of law and will result in irreparable injury and damage to plaintiffs and their members, as more particularly appears in the complaint herein and the affidavit of Albert K. Butzel, Esq., annexed hereto.

4. The issuance of said preliminary injunction will not cause undue loss to defendants, but will prevent irreparable injury to plaintiffs.

Dated: New York, New York
October 9, 1973

Yours, etc.,

BERLE, BUTZEL & KASS
Attorneys for Plaintiffs

By ALBERT K. BUTZEL
Albert K. Butzel
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Tel.: (212) 838-2700

**Affidavit of Albert K. Butzel in Support of Order
to Show Cause and Motion for Preliminary Relief**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 4276

[CAPTION OMITTED]

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

ALBERT K. BUTZEL, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court and of the firm of Berle, Butzel & Kass, one of the attorneys for the plaintiffs in this action. I make this affidavit in support of plaintiffs' order to show cause and motion for preliminary relief submitted herewith. I am fully familiar with the facts involved in the action, having acted for eight years as one of the attorneys for the conservationists who oppose the project in issue.

2. This action arises out of the proposal of defendant Consolidated Edison Company of New York, Inc. ("Con Edison") to construct and operate a pumped storage water-power project (the "Project") at Storm King Mountain on the Hudson River in Cornwall, New York. Because the Hudson is navigable, and because the Project would use the waters of the River to generate electricity, Con Edison

*Affidavit of Albert K. Butzel in Support of
Motion for Preliminary Relief*

was required to obtain a license from the Federal Power Commission ("FPC"). This it has done after protracted hearings and litigation. What the company has not done is to obtain permits from the Corps of Engineers of the U.S. Army (the "Corps") to conduct various dredging and filling operations in the Hudson in conjunction with the Project, and it apparently has no intention of doing so. Plaintiffs believe that such permits are necessary under Section 10 of the Rivers and Harbors Act of 1899 [33 U.S.C. §403] (hereinafter "Section 10") and Section 404 of the Federal Water Pollution Control Act, as amended [33 U.S.C. §1341] (hereinafter "Section 404"), which generally prohibit dredging and fill operations in navigable waters except upon approval of the Secretary of the Army, acting through the Chief of Engineers. However, in response to plaintiffs' demands that these statutory provisions be enforced against Con Edison, the Corps has taken the position that, as a matter of law, no permits are required. This action has accordingly been brought seeking a declaratory judgment that, contrary to the Corps' legal views, permits are required, and for an order (A) directing the responsible Corps officials (including the Secretary of the Army and the Chief of Engineers) to hold Con Edison to compliance with Section 10 and Section 404, and (B) enjoining Con Edison from proceeding with construction until the necessary permits are obtained.

3. Although the issues involved in this case are primarily issues of law, some understanding of the pertinent facts is essential. These can be briefly summarized. As indicated,

*Affidavit of Albert K. Butzel in Support of
Motion for Preliminary Relief*

the Project would be located on the Hudson, which is a navigable river. Landward of the Hudson, Con Edison proposes to construct the principal project works, including three underground power chambers housing pump-turbines and other electrical equipment (hereinafter, the "powerhouse"); a large storage reservoir 1000 feet above and a mile and a half back from the River; and a water tunnel drilled through Storm King Mountain connecting the reservoir and the powerhouse. In addition, however, the Project involves a series of activities in the Hudson itself and thus in navigable waters of the United States. These include: (A) dredging (excavation) in the Hudson in front of the powerhouse intake facilities, and (B) filling activities in the Hudson through the discharge and deposit of thousands of cubic yards of fill material in the River and along its shores immediately northwest of the powerhouse site. The fill material would consist primarily of rock and soil excavated from the powerchambers, the water tunnel and the reservoir area and then dumped into the Hudson at the indicated location. This dumping would create new land that would eventually be turned over to the Village of Cornwall for its use as a park, but would also bury large areas of the River bed.

4. The Rivers and Harbors Act of 1899 has long prohibited unauthorized dredging and filling in navigable waters. In particular, Section 10 prohibits unauthorized obstructions to the navigable capacity of any waters of the United States, and makes it unlawful to excavate materials from (i.e., dredge), or deposit materials in (i.e., fill) the

*Affidavit of Albert K. Butzel in Support of
Motion for Preliminary Relief*

channel of any navigable river "unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army". The dredge and fill work that Con Edison intends to undertake is of exactly this sort, and, on its face, Section 10 appears to require permits for such work.

5. Similarly, Section 404 of the Federal Water Pollution Control Act appears to apply in this case. This section, adopted by the Congress in 1972, vests in the Corps the permitting authority and responsibility for any discharge of dredged or fill material into navigable waters. The dumping of thousands of cubic yards of waste rock and other fill material into the Hudson within designated bounds northwest of the powerhouse is indisputably the type of activity to which Section 404 is directed, and would clearly appear to require Corps permits.

6. Notwithstanding the foregoing, the Corps has disclaimed any permit requirements in this case—this in response to plaintiffs' written demand that the Corps hold Con Edison to compliance with the applicable statutes. (A copy of the response is annexed to the complaint as Exhibit A). In taking this position, the Corps has not denied that the activities involved are of the sort referred to in Section 10 and Section 404. Rather, it has relied on a legal argument—to wit, that its usual permitting authority for such activities has been removed in this case by the Federal Power Act and the FPC's licensing of the Project. As stated by the Corps in its letter rejecting plaintiffs' demands:

*Affidavit of Albert K. Butzel in Support of
Motion for Preliminary Relief*

"The authority of the Secretary of the Army [under the Rivers and Harbors Act of 1899] to authorize structures or work in navigable waters in connection with water power projects was transferred to the Federal Power Commission by the Federal Water Power Act of 1920 (41 Stat. 1063; 16 U.S.C. 797). Accordingly, . . . permits will not be required."

And then, referring specifically to Section 404:

"The involvement of the Corps of Engineers in the Storm King Proposal has just recently been thoroughly reviewed in the light of the provisions of Section 404 of Public Law 92-500, the 'Federal Water Pollution Control Act Amendments of 1972'. Our position remains unchanged Therefore, there is no need for Corps of Engineers permits for the subject work . . ."

7. Turning first to Section 404, the Corps' position that the Federal Power Act has removed its usual jurisdiction makes no sense at all. The Federal Power Act became law in 1920, and thus it could not possibly have transferred to the FPC the Section 404 permitting authority which was vested in the Corps in 1972—52 years after passage of the Power Act.

8. Of equal importance, the Corps' own recently-promulgated regulations, specifying applicable permit requirements for water power projects [33 CFR §209.120(c)(3)], expressly recognize the applicability of Section 404 to such

*Affidavit of Albert K. Butzel in Support of
Motion for Preliminary Relief*

projects. Thus, while the regulations generally disclaim independent permit requirements for project structures licensed by the FPC, this disclaimer does not extend to Section 404. To the contrary, the regulations expressly state with respect to projects licensed by the Power Commission that:

"In all cases involving the discharge of dredged or fill material into navigable waters . . . , Department of the Army permits under Section 404 of the Federal Water Pollution Control Act . . . will be required".

As has been noted, this case involves very substantial discharges of waste rock and other fill material into the Hudson. Under the regulations cited above, as well as Section 404 itself, Department of the Army (Corps) permits are accordingly required. The Corps' disclaimer of jurisdiction is clearly mistaken, and its failure and refusal to act violate its statutory duties.

9. It should be emphasized that the Section 404 permit requirements are of major importance in this case, going far beyond the question of effects on navigation. Under the statute, the Corps must measure any such permit applications against a series of environmental considerations in accordance with guidelines developed by the Administrator of the U.S. Environmental Protection Agency in conjunction with the Secretary of the Army; and the Administrator has the power to override the decisions of the Corps based on such environmental considerations [33 U.S.C. §1344(b), (c)]. Many of the specified envi-

*Affidavit of Albert K. Butzel in Support of
Motion for Preliminary Relief*

ronmental factors, including impacts on fish and recreation, are involved in the work Con Edison proposed to carry out in the Hudson. Thus the Corps' refusal and failure to act runs directly counter to the environmental protections that Congress has written into, and presumably intended to implement through, Section 404.

10. As for permits under Section 10, the position taken by the Corps is not supported by any express provision of the Federal Power Act—and it is at odds with the Corps' actual practice in this case. Beginning in 1963 and then in 1965, after the FPC initially licensed the Project, Con Edison applied to the Corps for exactly those permits which the Corps now claims are not required—and the Corps not only entertained the application, but issued the permits.

11. The 1963 and 1965 permits have long since expired, and Con Edison has not attempted to renew them. Nor, despite its prior action, has the Corps sought renewals, suggesting instead that its issuance of the earlier permits "may possibly have been in error" (Exhibit A to the complaint). But this equivocal suggestion rings hollow. In 1965, the Federal Power Act had been national law for 45 years—yet the Corps regarded its authority under Section 10 as extending to the Project. Its change of heart at this late date, and in the absence of express language in the Power Act, is unwarranted.

12. While the Corps' disclaimer of jurisdiction may well have been made in good faith, we respectfully submit

*Affidavit of Albert K. Butzel in Support of
Motion for Preliminary Relief*

that it runs counter to law. The duties of the Corps, as described above, are clear—and they are duties that the Corps has failed and refused to carry out on the basis of an erroneous legal theory. Under the circumstances, it is, we submit, incumbent on this Court to rectify the failure by declaring that permits are required and directing the responsible Corps officials (defendants Callaway, Gribble and Lombard) to enforce, and hold Con Edison to compliance with, the statutory requirements.

13. Unless this Court grants the relief requested in the complaint and the preliminary relief now sought, plaintiffs will suffer irreparable injury. Plaintiffs are an individual fisherman and three conservation organizations who, and whose members, have a direct and special interest in the protection of the natural resources of the Hudson River, including its fisheries resources, scenic beauty and recreational uses. Thomas R. Lake, for example, fishes on a year-round basis in the exact area that Con Edison proposes to dredge and fill, and takes a substantial catch from these waters. Con Edison's proposed activities would make this impossible. In addition, Scenic Hudson, The Sierra Club and the Hudson River Fisherman's Association have long sought to protect the River and its resources (including Storm King Mountain) from the adverse impacts of the Project, while their members use these resources actively for fishing (including commercial fishing for livelihood), boating, hiking and scenic enjoyment. The operations that Con Edison proposes to carry out in the Hudson would severely impair these uses, and do irreparable dam-

*Affidavit of Albert K. Butzel in Support of
Motion for Preliminary Relief*

age to the resources of the River, by covering over bottom areas and aquatic life they support, by eliminating spawning, nursery and fishing sites, and by creating what amounts to a new shoreline northwest of the powerhouse. Furthermore, the filling activities would involve heavy construction equipment, with all the associated ugliness and noise.

14. The threat of the aforesaid damage is imminent. Con Edison has announced that it will commence construction of the Project in November and it clearly intends to do so without Corps permits. The exact nature of the initial construction work has not been disclosed by the company; however, based on information made available by the FPC, it appears that such work will include the excavation of rock and soil to create an entrance tunnel for the power chambers. Since the excavated rock and soil must be disposed of, and since the designated disposal site is in and along the Hudson northwest of the powerhouse location, there can be little doubt that the initial construction activities will include or inevitably require the dumping of fill material into the Hudson. Accordingly, unless this Court restrains Con Edison from commencing construction of the Project, irreparable damage will be inflicted before the case is resolved.

15. For the foregoing reasons, plaintiffs respectfully request that this Court issue an order enjoining Con Edison from commencing construction of the Project and undertaking the activities in navigable waters heretofore described pending the resolution of this case, and, further,

*Affidavit of Albert K. Butzel in Support of
Motion for Preliminary Relief*

preliminarily enjoining defendants Callaway, Gribble and Lombard from their continuing failure and refusal to enforce, and hold Con Edison to compliance with, the statutory permit requirements heretofore described. In connection with the foregoing, we emphasize that the issues involved in this action are principally, if not exclusively, issues of law which should not require a protracted trial, if any at all, and thus will not occasion any significant delay in the construction of the Project should the Corps' legal position be sustained. By contrast, if Con Edison is permitted to proceed despite the lack of permits, and if this Court then holds that permits are required, there will be no cure for the damage already done.

16. Plaintiffs seek an order to show cause herein, rather than proceeding by notice of motion, to permit judicial consideration of the issues before construction begins.

17. No prior application for the relief requested herein has been made to this or any other court.

18. For the reasons set forth above, it is respectfully requested that the order to show cause presented herewith be signed, and that upon hearing of plaintiffs' motion, the relief sought thereby be granted.

ALBERT K. BUTZEL

(Jurat omitted in printing.)

Summons in Support of Motion for Injunctive Relief

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

To the above named Defendants:

You are hereby summoned and required to serve upon BERLE, BUTZEL & KASS and WINER, NEUBERGER & SIVE, plaintiffs' attorneys, whose address is 425 Park Avenue, New York, New York 10022, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

RAYMOND F. BURGHARDT,
Clerk of Court.

B. EDWARDS,
Deputy Clerk.

[Seal of Court]

Date: October 9, 1973

Note:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

**Amended Complaint in Support of Motion
for Preliminary Relief**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

Plaintiffs, by their attorneys, for their complaint, respectfully allege as follows:

FIRST CLAIM FOR RELIEF

1. This action arises out of the plans of Consolidated Edison Company of New York, Inc. ("Con Edison") to construct and operate a pumped storage hydroelectric project at Storm King Mountain on the Hudson River in Cornwall, New York (the "Project"). The Project involves, among other things, dredging and fill activities in the Hudson, which is a navigable water of the United States. This action is brought to secure a judgment (A) declaring that such dredging and fill activities fall within the provisions of, and require permits from defendants Callaway, Gribble and Lombard under, Section 10 of the Rivers and Harbors Act of 1899 (U.S.C. §403) and Section 404 of the Federal Water Pollution Control Act as amended (33 U.S.C. §1344), (B) directing defendants Callaway, Gribble and Lombard to enforce, and secure compliance by Con Edison with, said statutory provisions and the permit and other requirements that follow therefrom; and (C) enjoining Con Edison from proceeding with the construction of the Project unless and until the required permits are obtained.

*Amended Complaint in Support of Motion
for Preliminary Relief*

2. Jurisdiction of this Court is based upon:

28 U.S.C. §1331 (Federal Question)

28 U.S.C. §1337 (Laws Regulating Commerce)

28 U.S.C. §1361 (Mandamus)

28 U.S.C. §2201-02 (Declaratory Judgment)

33 U.S.C. §§403, 407 (Rivers and Harbors Act)

33 U.S.C. §§1311, 1344 (Federal Water Pollution Control Act)

33 C.F.R. §209 (Corps of Engineers Permit Regulations)

5 U.S.C. §§701-706 (Administrative Procedure Act)

3. The matter in controversy exceeds \$10,000, exclusive of interest and costs.

The Parties

4. Plaintiff Scenic Hudson Preservation Conference ("Scenic Hudson") is a non-profit corporation organized and operating under the laws of the State of New York whose objects and purposes include the conservation and protection of the Scenic and other natural resources of the Hudson River, including the area of the Hudson Highlands centering around Storm King Mountain where the Project would be located. In addition to national and local conservationists, the membership of Scenic Hudson includes residents and property owners in the Village and Town of Cornwall in the immediate vicinity of the Project

*Amended Complaint in Support of Motion
for Preliminary Relief*

and numerous individuals who use the Hudson River and Storm King Mountain as a source of recreation, including for fishing, boating, hiking and scenic enjoyment. Scenic Hudson and its members will suffer special damage and be adversely affected by the actions herein complained of in that construction and operation of the Project and the activities in navigable waters hereinafter described would impinge upon fish and other aquatic life in the Hudson by covering over and otherwise despoiling large areas of the River bed, including spawning, nursery and fishing sites, degrade the scenic beauty of the River and Storm King Mountain, and generally disrupt the surrounding environment through heavy construction work, thereby impairing the rights of Scenic Hudson and its members in, and their use and enjoyment of, the resources of the Hudson and the properties which they own.

5 Plaintiff the Hudson River Fishermen's Association, Inc., (the "Fishermen's Association") is a non-profit membership corporation organized and operating under the laws of the State of New York and having as its principal objects and purposes the protection and enhancement of the fisheries resources of the Hudson River. The membership of the Fishermen's Association includes both commercial and sports fishermen who actively engage in fishing on the Hudson River, including a number who depend on the Hudson River fisheries for their livelihood. The Fishermen's Association and its members will suffer special damage and be adversely affected by the actions herein complained of in that construction and operation of the Project

*Amended Complaint in Support of Motion
for Preliminary Relief*

and the activities in navigable waters hereinafter described would destroy fish habitats and impinge upon fish and other aquatic life in the Hudson and thereby impair the rights of the Fishermen's Association and its members in, and their use and enjoyment of, the fisheries resources of the Hudson.

6. Plaintiff The Sierra Club is a non-profit corporation organized and operating under the laws of the State of California and having a nationwide membership. Its principal objects and purposes are the protection of the environment, including scenic and other natural resources, throughout the United States and abroad. The Atlantic Chapter of The Sierra Club is the local Chapter of The Sierra Club in the State of New York and certain other northeastern states. Through the Atlantic Chapter, The Sierra Club sponsors frequent hikes on and within the vicinity of Storm King Mountain, and has otherwise sought to protect the natural resources of the Hudson River and the Hudson Highlands. The Sierra Club and its members in New York will suffer special damage and be adversely affected by the actions herein complained of in that construction and operation of the Project and the activities in navigable waters hereinafter described would degrade scenic and other natural resources of the Hudson River and the Hudson Highlands in the vicinity of Storm King Mountain and thereby impair the rights of The Sierra Club and its members in, and their use and enjoyment of, such resources.

*Amended Complaint in Support of Motion
for Preliminary Relief*

7. Plaintiff Thomas R. Lake, whose residence address is 31 Meadow Drive, Wappingers Falls, New York, is a member of the Fishermen's Association and an active fisherman on the Hudson River in the vicinity of Storm King Mountain. Specifically, Mr. Lake fishes year-round, both from the shore and by boat, and on a frequent basis, in the exact area where Con Edison proposes to discharge and deposit vast amounts of fill materials into the River, and he takes from this location a sizable catch. Mr. Lake will suffer special damage and be adversely affected by the action herein complained of in that construction and operation of the Project and the activities in navigable waters hereinafter described would destroy fish habitats and impinge upon fish and other aquatic life in the area that he fishes and thereby impair his rights in, and use and enjoyment of, said resources.

8. Upon information and belief, defendants Howard H. Callaway, Lt. General William C. Gribble, Jr., and Colonel Harry T. Lombard are, respectively, Secretary of the Army, Department of Defense, U.S.A.; Chief of Engineers, Corps of Engineers of the U.S. Army; and District Engineer, New York District, Corps of Engineers of the U.S. Army. Under the applicable statutes and regulations of the Corps of Engineers, said defendants are charged with the administration and enforcement of Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Federal Water Pollution Control Act, as they apply to the Project.

9. Defendant Con Edison is a utility corporation organized and existing under the laws of the State of New

*Amended Complaint in Support of Motion
for Preliminary Relief*

York, with its principal office at 4 Irving Place, New York, New York.

*Violations of Section 10 of the Rivers
and Harbors Act of 1899*

10. The Project would be located on the Hudson River, which is a navigable water of the United States. The Project has been licensed by the Federal Power Commission, but, upon information and belief, permits have not been obtained from the Corps of Engineers for various activities to be undertaken in the navigable waters of the United States.

11. Upon information and belief, the Project plans call for the following activities to be undertaken in the navigable waters of the United States, to wit, in the Hudson River:

A. Excavation and dredging in the Hudson in front of the Project's intake structures.

B. Fill activities in the Hudson to the northwest of the plant site through the discharge and deposit of hundreds of thousands of cubic yards of fill material in the * * *

(Line of Copy Missing From Original)

*Amended Complaint in Support of Motion
for Preliminary Relief*

12. Under Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. §403) (hereinafter "Section 10"), the excavation from or depositing of fill material in any navigable waters of the United States is unlawful unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army by appropriate permit.

13. In 1963 and in 1965, after the Project was initially licensed by the Federal Power Commission, Con Edison applied for and received from the predecessors of defendants Callaway, Gribble and Lombard, permits to undertake the activities in navigable waters heretofore described.

14. Following the issuance of the aforesaid permits, the license for the Project which had been granted by the Federal Power Commission in 1965 was set aside by the United States Court of Appeals for the Second Circuit. Following remand, the Project was relicensed in 1970. In the interim, the permits issued in 1963 and 1965 expired and are of no present force and effect.

15. Upon information and belief, Con Edison has not reapplied for, or sought extensions of, the permits to conduct the activities in navigable waters heretofore described.

16. Con Edison has announced that it plans to commence construction of the Project in November 1973. Upon information and belief, it intends to do so, and to proceed with the activities in navigable waters heretofore described, without obtaining new or renewed Corps permits.

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17. In January 1973, plaintiffs Scenic Hudson and The Sierra Club wrote to defendant Lombard demanding that the Corps of Engineers "hold Con Edison to the statutory permit requirements in respect of dredging and filling for the . . . project."

18. By letter dated 27 March 1973, a copy of which is annexed hereto as Exhibit A and made a part hereof, defendant Lombard rejected plaintiffs' demands, stating in part as follows:

"This office did issue three separate permits for work related to the Storm King proposal in the mid-1960's. It is currently felt that the issuance of these permits may possibly have been in error. The authority of the Secretary of the Army to authorize structures or work in navigable waters in connection with water power projects was transferred to the Federal Power Commission by the Federal Water Power Act of 1920 (41 Stat. 1063; 16 U.S.C. 797). Accordingly, extensions to the expired permits will not be required."

19. The position taken by defendant Lombard is contrary to law and to the authority and duties of defendants Callaway, Gribble and Lombard under Section 10 with respect to the activities in navigable waters heretofore described. To the contrary, said activities fall within the provisions of, and require permits from defendants Callaway, Gribble and Lombard under, Section 10.

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20. The failure and refusal of defendants Callaway, Gribble and Lombard to hold Con Edison to compliance with, and to require permits under, Section 10 are arbitrary and capricious and in violation of said defendants' statutory duties and threaten to irreparably impair, in the manner described in paragraphs 4 through 7 of this complaint, the rights of plaintiffs and their members in, and their use and enjoyment of, the Hudson River, its resources and surrounding environment.

21. Con Edison's actions in undertaking the activities in navigable waters heretofore described, without obtaining the required permits, would be in violation of Section 10 and would irreparably impair, in the manner described in paragraphs 4 through 7 of this complaint, the rights of plaintiffs and their members in, and their use and enjoyment of, the Hudson River, its resources and the surrounding environment.

22. Upon information and belief, the failure and refusal of defendants Callaway, Gribble and Lombard to hold Con Edison to compliance with, and to require permits under, Section 10 will continue, and Con Edison will shortly proceed to construction of the Project without the required permits, unless this Court grants the relief requested herein.

23. By reason of the foregoing, and having exhausted their administrative remedies, plaintiffs are threatened with immediate and irreparable injury, and have no adequate remedy at law.

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SECOND CLAIM FOR RELIEF

Violations of Section 10 Regulations

24. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs 1 through 23 of this complaint.

25. The Corps of Engineers has recently promulgated new regulations specifying the permit requirements under the River and Harbors Act of 1899 applicable to water power projects licensed by the Federal Power Commission (38 Fed. Reg. 12217, May 10, 1973). Said regulations, proposed as 33 C.F.R. §209.120(c)(6), provide in pertinent part as follows:

"The Federal Power Act of 1920 . . . authorizes the Federal Power Commission (FPC) to issue licenses for the construction, operation and maintenance of dams, water conduits, reservoirs, transmission lines and other physical structures of a power project. However, where such structures will affect the navigable waters of the United States (as defined in 16 U.S.C. 796), the plans for the dam or other physical structures affecting navigation must be approved by the Chief of Engineers and the Secretary of the Army. In such cases, the interests of navigation should normally be protected by a recommendation to the FPC for the inclusion of appropriate provisions in the FPC license rather than the issuance of a separate Department of the Army permit under 33 U.S.C. 401 et seq. As to any other activities in navigable waters not constitut-

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ing construction, operation and maintenance of physical structures licensed by the FPC under the Federal Power Act of 1920, as amended, the provisions of 33 U.S.C. 401 et seq. [The Rivers and Harbors Act of 1899] remain fully applicable."

26. Upon information and belief, the dredging and fill activities heretofore described to be undertaken by Con Edison in the Hudson River do not constitute the construction, operation or maintenance of physical structures of the Project within the meaning of 33 CFR §209.120(c)(6). As a consequence, permits for such activities are required under said regulations, as well as under Section 10.

27. Insofar as 33 CFR §209.120(c)(6) purports to exclude from the permit requirements of Section 10 of the activities heretofore described to be undertaken by Con Edison in the Hudson River, said regulations are contrary to, and violate the requirements of, Section 10 and are void as a matter of law.

THIRD CLAIM FOR RELIEF

*Violations of Section 404 of the Federal Water
Pollution Control Act, as Amended*

28. Plaintiffs repeat and reallege each and every allegation set forth in paragraphs 1 through 11, 13 through 18, and 25 of this complaint.

29. Under Sections 301 and 404 of the Federal Water Pollution Control Act, as amended (33 U.S.C. §§1311,

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1344), and insofar as applicable, under Section 13 of the Rivers and Harbors Act of 1899 (33 U.S.C. §407) (the applicable statutory provisions being herein referred to as "Section 404"), the discharge of fill material into the navigable waters of the United States requires a permit from the Secretary of the Army, acting through the Chief of Engineers.

30. Under the regulations promulgated by the Corps of Engineers, specifying the Corps of Engineers' permit requirements in respect of water power projects licensed by the Federal Power Commission (33 CFR §209.120(c)(6)), it is expressly provided that:

"In all cases involving the discharge of dredged or fill material into navigable waters . . . , Department of the Army permits under Section 404 of the Federal Water Pollution Control Act . . . will be required."

31. Upon information and belief, as heretofore alleged, the activities which Con Edison intends to undertake in the navigable waters include the discharge of hundreds of thousands of cubic yards of fill material into navigable waters—to wit, into the Hudson River northwest of the plant site; and as such, Section 404 and the aforesaid regulations apply to, and require permits from defendants Callaway, Gribble and Lombard authorizing, such activities.

32. Upon information and belief, Con Edison has not applied for, or received from defendants Callaway, Gribble and Lombard, the permits required by Section 404 and the

*Amended Complaint in Support of Motion
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regulations quoted above, and to commence construction of the Project, and to proceed with the discharge of fill material into the Hudson, without obtaining such permits.

33. As heretofore alleged, defendant Lombard has rejected plaintiffs' demands that the Corps of Engineers hold Con Edison to statutory permit requirements with respect to dredging and filling. In rejecting such demands, defendant Lombard also disclaimed any duties under Section 404, stating that:

"The involvement of the Corps of Engineers in the Storm King Proposal has just recently been thoroughly reviewed in light of the provisions of Section 404 of Public Law 92-500, the 'Federal Water Pollution Control Act Amendments of 1972'. Our position remains unchanged. . . . Therefore, there is no need for Corps of Engineers permits for the subject work . . ."

34. The position taken by defendant Lombard is contrary to law, including the recently-promulgated regulations of the Corps of Engineers and the permit requirements established by Section 404.

35. The failure and refusal of defendants Callaway, Gribble and Lombard to hold Con Edison to compliance with, and to require permits under, Section 404 and the regulations of the Corps of Engineers heretofore cited are arbitrary and capricious and in violation of said defendants' lawful duties and threaten to irreparably impair, in the manner described in paragraphs 4 through 7 of this

*Amended Complaint in Support of Motion
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complaint, the rights of plaintiffs and their members in, and their use and enjoyment of, the Hudson River, its resources and the surrounding environment.

36. Con Edison's actions in discharging fill material into navigable waters, as heretofore described, without obtaining the required permits, would be in violation of Section 404 and the recently-promulgated regulations of the Corps of Engineers and would irreparably impair, in the manner described in paragraphs 4 through 7 of this complaint, the rights of plaintiffs' and their members in, and their use and enjoyment of, the Hudson River, its resources and the surrounding environment.

37. Upon information and belief, the failure and refusal of defendants Callaway, Gribble and Lombard to hold Con Edison to compliance with, and to require permits under, Section 404 and the regulations heretofore cited will continue, and Con Edison will shortly proceed to construction of the Project without the required permits, unless this Court grants the relief requested herein.

33. By reason of the foregoing, and having exhausted their administrative remedies, plaintiffs are threatened with immediate and irreparable injury, and have no adequate remedy at law.

WHEREFORE, plaintiff prays for judgment:

A. Declaring that the dredging and fill activities to be undertaken by Con Edison in the navigable waters of the

*Amended Complaint in Support of Motion
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United States, as described in the complaint, fall within the provisions of, and require permits from defendants Callaway, Gribble and Lombard under, Section 10 of the Rivers and Harbors Act of 1899, Section 404 of the Federal Water Pollution Control Act, as amended, and, insofar as the same are consistent with the aforesaid statutes, the applicable regulations of the Corps of Engineers;

B. Directing defendants Callaway, Gribble and Lombard to enforce, and secure compliance by Con Edison with, the aforesaid statutory provisions and the permit and other requirements that follow therefrom;

C. Declaring unlawful, and enjoining defendant Con Edison from proceeding with, construction of the Project and the activities that it intends to undertake in navigable waters unless and until Con Edison has obtained the required permits.

D. Granting such preliminary relief as may be necessary to prevent irreparable injury to plaintiffs pending the trial of this action and the making and entry of final judgment; and

E. Granting such other and further relief as this Court may deem just and proper, together with the costs and disbursements of this action.

33a

*Amended Complaint in Support of Motion
for Preliminary Relief*

Dated: New York, New York
October 12, 1973.

BERLE, BUTZEL & KASS
425 Park Avenue
New York, New York 10022

WINER, NEUBURGER & SIVE
425 Park Avenue
New York, New York 10022

Attorneys for Plaintiffs

By ALBERT K. BUTZEL

34a

EXHIBIT "A" ANNEXED TO
AMENDED COMPLAINT



DEPARTMENT OF THE ARMY
NEW YORK DISTRICT, CORPS OF ENGINEERS
23 FEDERAL PLAZA
NEW YORK, N. Y. 10007

REPLY TO
ATTENTION OF:
NANOP-E

27 March 1973

Berle, Butzel & Kass
Attn: Mr. Albert K. Butzel
425 Park Avenue
New York, N. Y. 10022

Gentlemen:

Reference is made to your letter of 24 January 1973, on behalf of the Scenic Hudson Preservation Conference and the Sierra Club concerning the proposal by Consolidated Edison Company of New York to construct a pumped storage hydroelectric project on the Hudson River at Storm King Mountain, Cornwall, New York. In your letter you demanded that my office "... hold Con Edison to the statutory permit requirements in respect of dredging and filling for the Cornwall project; that an appropriate Environmental Impact Statement be prepared and circulated in conjunction therewith; and that hearings be called to consider the Impact Statement."

This office did issue three separate permits for work related to the Storm King proposal in the mid-1960's. It is currently felt that the issuance of these permits may possibly have been in error. The authority of the Secretary of the Army to authorize structures or work in navigable waters in connection with water power projects was transferred to the Federal Power Commission by the Federal Water Power Act of 1920 (41 Stat. 1063; 16 U.S.C. 797). Accordingly, extensions to the expired permits will not be required.

The involvement of the Corps of Engineers in the Storm King Proposal has just recently been thoroughly reviewed in light of the provisions of Section 404 of Public Law 92-500 the "Federal Water Pollution Control Act Amendment of 1972." Our position remains unchanged. Accordingly, the participation of this office will be through comment to the Federal Power Commission, the lead Federal Agency in this proposal. Therefore, there is no need for Corps of Engineer permits for the subject work. Consequently, neither hearings nor an Environmental Impact Statement are required by my office.

Sincerely yours,

James W. Lombard
JERRY W. LOMBARD
Colonel, Corps of Engineers
District Engineer

Notice of Motion for Summary Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

S I R S :

PLEASE TAKE NOTICE that defendant Consolidated Edison Company of New York, Inc. will move this Court, Hon. Morris E. Lasker, U.S.D.J., in Room 2903, United States Court House, Foley Square, New York, New York on November 2, 1973 at 10:00 A.M., or as soon thereafter as counsel may be heard, upon the amended complaint hereto, the answer of defendant Consolidated Edison Company of New York, Inc. thereto, the affidavit of G. S. Peter Bergen sworn to October 22, 1973, and the affidavit of Frank D. McElwee sworn to October 22, 1973, for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, (i) dismissing the amended complaint herein and (ii) on defendant Consolidated Edison Company of New York, Inc.'s counterclaim for declaratory judgment, declaring that neither Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. §403) nor §404 of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. §1344) requires defendant Consolidated Edison Company of New York, Inc. to apply to the Corps of Engineers in order to construct the project work in navigable waters licensed by the Federal Power Commission on August 19, 1970 in FPC Project No. 2338, and for such other and further relief as may be just and proper.

Notice of Motion for Summary Judgment

PLEASE TAKE FURTHER NOTICE that answering papers, if any, shall be served upon the undersigned within the period of time prescribed by the Rules of this Court.

Dated: October 23, 1973
New York, New York

LEBOEUF, LAMB, LEIBY & MACRAE

By G. S. PETER BERGEN

A Member of the Firm

Attorneys for Defendant

*Consolidated Edison Company
of New York, Inc.*

One Chase Manhattan Plaza
New York, New York 10005
422-6262

[To All Attorneys of Record]

Statement Pursuant to Local Rule 9(g)**UNITED STATES DISTRICT COURT****SOUTHERN DISTRICT OF NEW YORK**

[CAPTION OMITTED]

STATEMENT OF DEFENDANT CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC. TO THE MATERIAL FACTS AS TO WHICH
IT IS CONTENDED THAT THERE EXIST NO GENUINE ISSUE
TO BE TRIED

1. Consolidated Edison plans to construct a pumped-storage hydroelectric facility of approximately 2,000 megawatts capacity in and near the Village of Cornwall on the west bank of the Hudson River in Orange County, New York.

2. Construction and operation of this project was licensed on August 19, 1970, by the Federal Power Commission. The License, Opinion and Order is published at 44 F.P.C. 350. Actual construction of the project works should commence prior to October 1, 1974, pursuant to the license as amended and the Federal Power Act.

3. As part of the licensed construction activity to build project works and structures Con Edison must place a quantity of rock into the Hudson River. This will be the foundation for a project recreational park which will be transferred to the Village of Cornwall, but which will remain a project structure after such transfer. Such placing of rock in the River is scheduled to commence on or about August, 1974.

Statement Pursuant to Local Rule 9(g)

4. The rock which will form the foundation for the park will be excavated from the area where the underground power plant and tunnels will be located. On top of this rock (above water level) will be placed additional material excavated from the River bed in the course of construction of the tailrace and underwater transmission lines.

5. The park area is required to be constructed by Article 37 of the license, and is within the Project boundary as defined in exhibits and drawings which Con Edison is required to submit to the Federal Power Commission pursuant to its regulations.

6. Construction work on the tailrace structures (through which water will be drawn out of and discharged back into the Hudson River) will commence in March, 1976. Such work will entail the placing of a cofferdam structure in the River (into which approximately 60,000 cubic yards of excavated underground rock will be placed temporarily) and the excavation of approximately 20,000 cubic yards of material from the River bed.

7. Construction work on the transmission line crossing is scheduled to begin in March, 1976. This work will entail the excavation of a trench in the River bed into which the submarine cable will be placed.

8. Construction work scheduled from November, 1973 through July, 1974 will not involve any dredging, filling or other work in the Hudson River.

9. Con Edison has not applied for nor does it have a currently effective permit from the Corps of Engineers

Statement Pursuant to Local Rule 9(g)

pursuant to Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. §403) in connection with the project.

10. Consolidated Edison has not applied for nor has it received a permit from the Corps of Engineers pursuant to Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. §1344) in connection with the project.

11. Exhibit A to the amended complaint is a true copy of a letter dated March 27, 1973 from Col. Harry W. Lombard, District Engineer, New York District, Corps of Engineers, U. S. Army, to Messrs. Berle, Butzel & Kass.

Respectfully submitted,

LEBOEUF, LAMB, LEIBY & MACRAE

By G. S. PETER BERGEN

*Attorneys for defendant Consolidated
Edison Company of New York, Inc.*

One Chase Manhattan Plaza
New York, New York 10005
(212) 422-6262

[To All Attorneys of Record.]

Dated: October 23, 1973

New York, New York

**Affidavit of G. S. Peter Bergen in Support of Motion
for Summary Judgment**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

{CAPTION OMITTED}

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

G. S. PETER BERGEN, being duly sworn, deposes and says:

1. I am a partner in the firm of LeBoeuf, Lamb, Leiby & MacRae, of counsel for Consolidated Edison Company of New York, Inc. (hereinafter "Con Edison") in this action. I have been involved in our firm's work in representing Con Edison with respect to its planned Cornwall Project since 1963. I am familiar with the legal proceedings and background of the Cornwall Project since that time.
2. I make this affidavit in order to advise the Court in this action of the extensive legal background of the Cornwall Project and the broad scope of issues with respect to the Project which Con Edison and the plaintiffs (Scenic Hudson, Hudson River Fishermen's Association and Sierra Club) have litigated over the past 11 years in various agencies and courts.
3. The issuance by the FPC in August, 1970 of a license for the Project was preceded by some eight years of

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administrative adjudication in the FPC and appeals to the federal courts. The 1970 license order and opinion of the FPC (44 FPC 350) was appealed to the United States Court of Appeals for this circuit (*Scenic Hudson Preservation Conference v. FPC*, 453 F.2d 463 (2d Cir. 1971) *cert. denied*, 407 U.S. 926 (1972)) which held that the 1970 licensing order and opinion fully satisfied the requirements of the Federal Power Act and the National Environmental Policy Act (NEPA). During the period subsequent to the issuance of the 1970 FPC license, the New York State Department of Environmental Conservation issued a water quality certificate for the Project called for under Section 21(b) of the Federal Water Pollution Control Act as then in effect.

4. The following is a summary of the FPC licensing proceedings which led to the issuance in August, 1970 by the FPC of its order licensing the Project.

(a) Con Edison originally filed its application for a license to construct and operate the Project with the FPC in January, 1963. It planned to have the first unit on line in late 1967.

(b) By letter dated June 7, 1963 the Chief of Engineers advised the Chairman of the FPC pursuant to §4(e) of the Power Act that Con Edison's proposed Project would not significantly affect navigation and that the plans of the structures affecting navigation were satisfactory (attached hereto as Exhibit 1).

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(c) Hearings were held before the FPC on the application in 1964 and 1965. As then contemplated, the Project was to consist of facilities substantially as described above, except that the powerhouse then proposed would have been only 80% underground and 20% above the surface. The FPC first licensed construction and operation of the Project on March 9, 1965 (33 FPC 428).

(d) On December 29, 1965 the United States Court of Appeals for the Second Circuit reviewed the Commission's first licensing order and remanded the proceedings for further hearings. The Court mandated that "all relevant factors" as to the Project's impact on the environment be considered. *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608 (2d Cir. 1965) cert. denied 384 U.S. 941 (1966) [hereinafter referred to as "*Scenic Hudson I*"].

(e) Con Edison amended its application for the Project on May 31, 1966 to provide for relocating the powerhouse entirely underground. On July 29, 1966 the Chief of Engineers advised the FPC that these amended plans had been approved in accordance with Sections 4(e) of the Power Act insofar as the interests of navigation are concerned (attached hereto as Exhibit 2).

(f) Further hearings before the FPC on remand continued from November, 1966 through May, 1967, covering multiple issues including the Project's impact on scenery, all feasible alternatives to the Project, recreational development, fish protection, transmission line routing and

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related matters. Those issues are described in greater detail in the Commission's order of August 19, 1970, Exhibit II hereto. On August 6, 1968, following close of the remanded hearings, the Presiding Examiner issued his initial decision recommending that the Project be licensed.

(g) In October, 1968 the City of New York petitioned to reopen the proceedings on the question whether the proposed location of the underground powerhouse posed any meaningful risk to the City's Catskill Aqueduct. The proceedings were reopened on the aqueduct issue and the question whether an alternate powerhouse site was available was also considered. Further hearings on the aqueduct and alternate powerhouse site questions consumed another three months and were completed in April, 1969, following which, in December, 1969, the Presiding Examiner concluded that the underground powerhouse posed no risk to the City's Catskill Aqueduct and recommended that the Project be licensed.

(h) The record of the FPC proceedings at this point consisted of over 19,000 pages of transcript and 675 exhibits, based on the testimony of some 80 witnesses who appeared and reappeared over the years.

(i) After hearing oral argument and viewing the proposed site, the five members of the Federal Power Commission issued its licensing order in Opinion No. 584 on August 19, 1970.

(j) In response to the FPC's 1970 license order and opinion, Scenic Hudson Preservation Conference, Sierra Club,

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City of New York and others petitioned the United States Court of Appeals for the Second Circuit for review. After hearing and consideration, those petitions for review were denied on October 22, 1971. (*Scenic Hudson Preservation Conference v. FPC*, 453 F.2d 463 (2d Cir. 1971), *cert. denied* 407 U.S. 926 (1972)) [hereinafter referred to as "Scenic Hudson II"].

5. After the hearing record in the FPC proceedings was closed in April, 1969, the National Environmental Policy Act of 1969 (NEPA) was enacted, effective January 1, 1970. The Federal Power Commission in its licensing order and opinion of August 19, 1970 concluded that the hearing record before the Commission "amply demonstrates that full and careful consideration was given to all the concerns which the Act [NEPA] embodies" (44 FPC at p. 60). Accordingly the Commission licensed the Project:

" . . . because the record in this proceeding establishes that this is the best use of available resources to meet the requirements for electric energy with the minimum adverse impact on our environment. The record establishes that no alternative can so well meet the requirements with lesser detriment to our environment" (44 FPC at p. 61).

6. On review in the Second Circuit Court of Appeals, the petitioners claimed, among other things, that the Commission's order did not comply with NEPA. After considering the legal issues the Court concluded:

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for Summary Judgment*

"The Commission has complied with the specific directives contained in Section 102 of [NEPA]. The hearings reflected the 'systematic interdisciplinary approach' required by that section. The Commission consulted with other agencies, as required by Section 102, including the Chief of Engineers, the Advisory Counsel on Historic Preservation, the Department of the Interior, the Atomic Energy Commission and a number of State and local groups that stand to be affected. The environmental statement required by Section 102(2)(C) of the Act . . . was submitted in the form of the Commission's opinion. In view of the exhaustive environmental findings which occupied a substantial portion of the Commission's opinion, and the Commission's explicit conformance with the enumerated portions of the required statement, we conclude that full compliance with the National Environmental Policy Act has been demonstrated" (*Scenic Hudson II* at p. 481).

7. Accordingly, the Federal Power Commission's licensing order of August 19, 1970 satisfies the requirements of NEPA and the broad study of the Project's environmental impact called for under NEPA has been satisfactorily completed.

8. A Water Quality Certificate, called for pursuant to Section 21(b) of the Federal Water Pollution Control Act as amended in 1970 (33 U.S.C.A. 1171(b)) was issued for the Project by the Commissioner of the New York State

*Affidavit of G. S. Peter Bergen in Support of Motion
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Department of Environmental Conservation on August 17, 1971. Such certificate was duly filed with the Federal Power Commission on the following day. That certificate provided there is reasonable assurance that construction and operation of the Project will not adversely affect applicable water quality standards.

9. The State Commissioner's determination to issue the water quality certificate was appealed to the New York State Courts by Scenic Hudson Preservation Conference, City of New York and others. On July 11, 1972 the Appellate Division entered an order dismissing those appeals (*deRham et al. v. Diamond*, 39 A.D. 2d 302 (3rd Dept. 1972)). The Appellate Division's order was affirmed by a unanimous Court of Appeals per an opinion of Chief Judge Fuld (32 N.Y.2d 34 (1973)).

10. By petition to the Federal Power Commission dated February 2, 1973, the Hudson River Fishermen's Association (HRFA) moved for a Commission order to reopen the FPC proceedings and amend the Project license on the ground that Project operation should be restricted during the Spring of the year to assure protection of young fish. Scenic Hudson, by separate petition dated March 28, 1973 joined in HRFA's petition and urged that evidentiary proceedings should be reopened in the FPC on the grounds of "newly discovered evidence", including an assertion that the Project was no longer economically feasible because of the delay in its construction and the ensuing increase in construction costs and interest rates. This position should be contrasted with Scenic Hudson's present position,

*Affidavit of G. S. Peter Bergen in Support of Motion
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which is that construction should be indefinitely delayed by a preliminary injunction from this Court.

11. Con Edison answered these petitions and moved to dismiss.

12. By order dated May 31, 1973 the Federal Power Commission denied the petitions of Scenic Hudson and HRFA to reopen. On July 26, 1973 the Commission further issued an order denying applications for rehearing of the May 31 order filed by Scenic Hudson and HRFA.

13. Scenic Hudson and HRFA, on August 27, 1973 filed petitions for review and to set aside the aforesaid FPC orders of May 31 and July 26, 1973 in the United States Court of Appeals for the Second Circuit. The matter is presently pending in that Court.

G. S. PETER BERGEN

(Jurat omitted in printing.)

EXHIBIT 1 ANNEXED TO AFFIDAVIT OF
G. S. PETER BERGEN

100-100000-100
NO. 8453

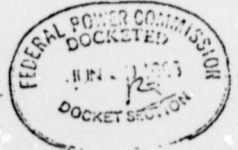
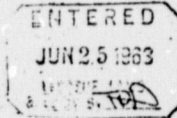
FROM
FEDERAL POWER COMMISSION

U.S. GOVERNMENT PRINTING OFFICE: 16-40457-0

FORWARDED BY AIR MAIL
Washington 25, D. C.

U.S. DEPARTMENT OF COMMERCE
WASHINGTON 25, D.C.

7 June 1963



Dear Mr. Chairman:

Reference is made to the Commission's letter dated 11 March 1963 concerning the application for license filed by Consolidated Edison Company of New York, Incorporated, for proposed hydroelectric Project No. 2338 to be located on the Hudson River in Orange County, New York.

It is considered that the applicant's proposed project would not significantly affect navigation. However, in order to protect the interests of navigation, it is recommended that the provisions in the interest of navigation included in Articles 8, 13 and 18 of the Commission's Form L-4, dated 15 December 1953, be inserted in the license if issued.

The plans of the structures affecting navigation are satisfactory.

One copy of the application is returned as requested.

Sincerely yours,

1 Incl
Applicant

Engineers
Civil Works
SRS

ONLY COPY AVAILABLE

49a

EXHIBIT 2 ANNEXED TO AFFIDAVIT OF
G. S. PETER BERGEN

REGISTERED MAIL

DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF ENGINEERS
WASHINGTON, D.C. 20315

RECEIVED

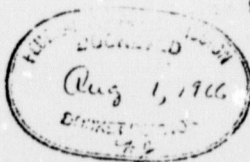
REC'D-EP

AUG 1 1966

29 July 1966

FEDERAL POWER COMMISSION

Mr. Lee C. White
Chairman, Federal Power Commission
Washington, D. C. 20426



Mr. Chairman:

Reference is made to the Commission's letter dated 17 June 1966
terminating an application for license filed by the Consolidated Edison
Company of New York, Inc., for the Cornwall Pumped-Storage Project No.
1, located on the Hudson River in Orange County, New York.

The plan of the structures affecting navigation is satisfactory,
the tracing has been approved in accordance with Section 4(e)
of the Federal Power Act insofar as the interests of navigation are
concerned.

The tracing is being returned as requested by registered mail.

Sincerely yours,

G. S. Peter Bergen
Colonel, Corps of Engineers
Assistant Director of Civil Works
for Federal Power Commission

13 Tracing No.
100-100-100000

ONLY COPY AVAILABLE

**Affidavit of Frank D. McElwee in Support of Motion
for Summary Judgment**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

FRANK D. McELWEE being duly sworn deposes and says:

1. I reside at 18 Beechwood Road, Ho Ho Kus, New Jersey. I am an employee of Consolidated Edison Company of New York, Inc. (hereinafter "Con Edison") and am the Project Manager for the Cornwall Project. In that capacity I have been delegated general responsibility for overseeing and supervising the activities leading up to and involving the construction of the Project.

2. I have made this affidavit in order to advise the court as to the nature of the Cornwall Project and Con Edison's intentions and plans for the construction of the Project.

3. I have been employed by Con Edison since September 1969. Previous assignments with Con Edison included Resident Construction Manager for its Indian Point nuclear generating plants, and Project Manager of Advance Facilities. Prior to joining Con Edison I was an officer in the United States Army Corps of Engineers, and as such

*Affidavit of Frank D. McElwee in Support of Motion
for Summary Judgment*

held various ranks and assignments between the period 1942 to 1967. Those assignments included District Engineer, Walla Walla District from 1964 to 1967. During this period I supervised a large civilian staff of engineers (all disciplines), other professionals and technical specialists engaged in the planning, design, and construction of multi-purpose water resource projects valued at over \$1 billion. I retired from the Corps of Engineers in 1967 with the rank of Colonel. From 1967 to 1969 I was a Senior Staff Engineer and later Partner in the New York City consulting firm of Coverdale & Colpitts.

4. I am a registered professional engineer in the State of New York.

5. My educational background includes a B.S. in Chemical Engineering from Louisiana State University and a M.S. in Mechanical Engineering from the University of California.

6. In my capacity as Cornwall Project Manager I am familiar with the physical aspects of the Project, its function and purposes, and the construction schedule and plan with respect thereto.

Description of the Cornwall Project

7. The Cornwall Project will be a pumped storage hydro-electric generating facility of approximately 2,000 megawatts capacity. It will be located on the West bank of the Hudson River in and near the Village of Cornwall and the Towns of Cornwall and Highlands in Orange County, New

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York. The Project transmission lines will cross beneath the Hudson River via submarine cables and extend across portions of Putnam and Westchester Counties via overhead lines to Con Edison's principal transmission network.

8. I am attaching as Exhibits I and II to this affidavit two maps showing the plan of project structures. Exhibit I (FPC Exhibit 614) is a General Map. Exhibit II (FPC Exhibit 616) is a Plan showing closer detail of the powerhouse and tunnels. I am also attaching a schematic cross section of the underground features of the project as Exhibit III.

9. The principal physical features of the Project will be (1) a storage reservoir in the Hudson Highlands west of Highway 9W, (2) a concrete lined tunnel to transport water between the reservoir and the generating station, (3) an underground generating station containing eight reversible pump-turbine-generators situated underground near the shoreline of the Hudson River, (4) transmission facilities comprising submarine cables under the bed of the Hudson River, underground cables extending a distance of about 4500 feet eastward from the east bank of the river, and overhead transmission facilities connecting to the existing transmission network, and (5) a project recreational park located along the River shoreline and constructed on top of rock and other material excavated during the course of construction of the other project works.

10. The storage reservoir will be located in a natural depression between Mount Misery, Whitehorse Mountain,

*Affidavit of Frank D. McElwee in Support of Motion
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Hill of Pines and surrounding ridges. Five rock-filled dikes will be placed in saddles between the ridges to complete the reservoir. It will have a surface area of approximately 240 acres and, at maximum water elevation (1160 feet above sea level), have a storage capacity of 25,000 acre feet.

11. A 40 foot diameter circular tunnel about 10,000 feet in length will connect the storage reservoir to the sub-surface powerhouse at river edge.

12. The underground powerhouse will consist of three chambers, a turbo-generator gallery, a transformer gallery, and a gate gallery. Eight tailrace tunnels will emerge beneath the River's surface at River's edge, at which point provision will be made for screens for fish protection. The screens will be fixed to a railroad bridge structure which is required to replace the existing Penn Central tracks at that location and which currently utilize the area immediately in front of the tailrace. The only visible aspects of the Project at River level will be the recreational park, railroad bridge structure, at the same elevation as the existing railroad tracks, the powerhouse portal entrance, which will be screened with native plantings, and an access road.

13. The 57 acre recreational park area will be located on riverfront properties extending from near the powerhouse site northward along the River shoreline. It will contain recreational, picnic, and boat-launching facilities.

*Affidavit of Frank D. McElwee in Support of Motion
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Purpose of the Project

14. The purpose of the Cornwall Project is to supply electricity in the form of reliable peaking power to the Con Edison system, which serves New York City and parts of Westchester County, and to interconnected utility systems during periods of peak demand and during periods of emergency. The project will withdraw water from the Hudson River, store it in an upper reservoir, and release it from the upper reservoir through a tunnel. The water flowing down the tunnel will rotate hydroelectric turbines located in the underground powerhouse. The turbines will generate electricity when the demands of electric consumers are high. During times when the demand for electricity is low, usually at night and on weekends, the turbines will be reversed and operated as pumps to refill the upper reservoir with water from the River. The pumps will be driven by electric energy generated at the most efficient generating systems located throughout the Con Edison system and the generating plants of the interconnected systems.

Construction Schedule and Sequence for the Project

15. Con Edison's construction schedule for the Project calls for work to commence in late November or December, 1973. The work which will begin at the site at that time will be the driving of an adit (a small diameter tunnel) into the area of the underground powerhouse chambers. This work is scheduled to be completed in about March,

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1974. The rock to be excavated from this tunnel will be placed on land, and not in the waters of the Hudson River.

16. In about January, 1974 construction of a haul road between the entrance to the underground powerhouse and the site of the recreational park will be started. This work will take until August, 1974 to complete.

17. Excavation of the entrance tunnel portal will start in January, 1974 to provide construction material for the haul road.

18. Upon completion of the haul road, excavation of the underground power plant chambers and power tunnel will be started. Commencement of this work is dependent upon completion of the haul road which is needed to provide access to the recreational park area; this park area will be built utilizing the rock excavated from the underground project structures.

19. In March, 1976 construction work on the tailrace structures and transmission line crossing is scheduled to begin.

20. In order to build the tailrace structure, through which water will be drawn in and discharged, sheet-piling will be driven into the River bottom to form a cofferdam, into which approximately 60,000 cubic yards of rock, excavated from underground, will be placed temporarily for stability. The cofferdam structure will create a small impoundment on its land side. The Penn Central Railroad

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track, located on the west shore of the Hudson River, will then be temporarily rerouted over the cofferdam structure. The impoundment will be unwatered and the tailrace for the project will be excavated in the dry. Later, upon completion of the tailrace tunnels, forebay, and new railroad bridge and screen structure, the cofferdam sheet piling will be removed and the 60,000 cubic yards of cofferdam material, plus an additional 20,000 cubic yards of surrounding material, will be excavated. This material will be placed above water level in the recreational park area.

21. The recreational park, of about 57 acres, will be constructed of approximately 1.74 million cubic yards of rock excavated from the underground power plant and tunnels. This rock will be placed in the River over the entire proposed park area to elevation +12 (9 feet above Mean High Water). On top of this rock material will be placed up to 144,000 cubic yards of earth and 315,000 cubic yards of dredged material. The earth will be taken from the plant site. The dredged material will be excavated in the course of construction of the plant tailrace and transmission line crossing.

22. Construction of the recreational park is essential to accomplish construction of other project features. Legally, I am advised that it is required by the FPC license to be built in partial fulfillment of license Article 37 and Section 10(a) of the Act. Physically, it will provide the best economically feasible site to place the rock material

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excavated from the tunnels and underground powerhouse. It would be impractical, as a matter of cost and as a matter of inconvenience to the Village residents, to haul this amount of rock by truck through the Village to a land-fill site. Also, the Village has, in the FPC hearings, expressed a desire for the park, and its construction will provide needed access to the River for the public (see 44 FPC at 484).

23. The park area is within the Project boundary as defined in Project Exhibits J, K, L, and R, which are Exhibit drawings which Con Edison is required to submit to the Federal Power Commission (in revised form) pursuant to Articles 33 and 34 of the license. The park area is required to be constructed pursuant to Article 37 of the Project license, and such area is shown in Project Exhibit R. It is one of the project works (44 FPC at 362).

24. As called for under Article 33 of the license, Con Edison intends to submit revised Exhibits J, L, M and R, showing the final designs of the project works, prior to commencement of construction of the Project structures.

25. Con Edison's decision to go forward with work at the Project site in November or December 1973 is based upon the urgent need for the Project, and upon the fact that it has been advised by counsel that its Project license could expire on October 1, 1974 unless actual construction of project works is underway by that time. This

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is because, I am advised, of the requirements of §13 of the Federal Power Act (16 U.S.C.A. 806) which provides that construction of a licensed project must start within two years of the effective date of that license, unless an extension is granted by the Federal Power Commission (FPC), which extension may be granted only once, and not for a period in excess of two additional years. Con Edison's FPC license became effective October 1, 1970, and was extended for a two year period (until October 1, 1974) by the Commission's order of July 25, 1972. This extension order was issued at Con Edison's request because of the delays and uncertainties raised by litigation which Scenic Hudson, Hudson River Fishermen's Association, and others had commenced.

26. In order to assure that project works are under actual construction by October 1, 1974 it is necessary to commence preparatory work at the site as soon as possible, including the drilling of the preliminary adit and the construction of the haul road.

The need for the Project without further delay

27. Any delay in construction of the Project at the current stage of Project planning must necessarily be reflected in further delay in the date in which the Project will finally be placed in operation. The very substantial benefits in terms of service reliability and service economies which will accrue to the persons served by the Company from the Project will, of course, be deferred for at least the same period of time. But further delay

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will not only deprive the persons served by Con Edison of the power supply benefits of the Project, it will also add substantially to the cost of the Project itself. That cost will eventually be passed on to all customers in the form of increased rates for electric service. Deferral of the installation date of the generating units at Cornwall will add substantially to the costs imposed on the Company's customers, because the Company will undoubtedly be required to meet anticipated demands on an interim and less satisfactory basis from other, more costly sources of power.

28. There are a number of other factors which add to the costs of delay. A complex construction plan must be initiated and completed to enable the Company to keep Project construction on schedule. Even the limited amount of construction scheduled for late 1973 and early 1974 is essential to the overall construction program. The construction proposed on fast lands in the months immediately ahead requires the mobilization of labor and equipment. Activities are now in progress preparatory to the letting of contracts, obtaining labor and materials and the purchasing or renting of equipment. Once assembled, these resources are costly to maintain in a state of idleness which would be imposed upon them if the preliminary injunctive relief sought by the plaintiffs were granted.

29. As of September 30, 1973 the Company had already charged approximately \$24,773,000 to construction of the Cornwall Project including more than \$350,000 in annual

Affidavit of Frank D. McElwee in Support of Motion

license fees assessed by the Federal Power Commission. Yet, the Company has thus far been unable to exercise its rights as a Federal Power Commission licensee or to implement its engineering planning to the extent of even breaking ground at the Project site. An investment of this magnitude is costly to carry, even absent any on-site activity. Interest charged to the amount already invested in the Project now total approximately \$108,000 each month.

30. The 2,000,000 kw Cornwall Project has been, is, and will be an element of critical importance to the Company's ability to meet its service requirements. Con Edison must provide electric service to more than 3,000,000 customers residing in the five boroughs of the City of New York and in Westchester County. The Company's service area is the most densely populated metropolitan area in the United States. Adequacy and reliability of electric service is of foremost concern.

31. The Company's summer peak customer demands for electric service are increasing at a rate of approximately 450,000 kw annually. The Company must provide the facilities to meet these increasing demands as they occur and in the most economic manner practicable.

32. Electric system reliability requires that the Company not only have adequate generating capacity to meet forecast customer demands, but also that capacity be provided for emergencies which result from the loss of generating equipment. Delays in the installation of generating units throughout the State, including the Cornwall Project,

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in recent years have contributed to the deficiencies in power supply on Con Edison's system and elsewhere in the State. These deficiencies have forced the Company to resort to voltage reduction every summer since 1970 in order to assure that sustained overloads will not persist and become aggravated to such an extent that the "brownouts" resulting from voltage reduction extend into a complete disruption of service or blackout.

33. The Cornwall Project is designed to provide the capacity necessary to prevent such occurrences. It will also under normal operating conditions be utilized to meet peak loads. In its peaking function, the Project will use low cost energy for pumping during off-peak periods in order to store water in the upper reservoir. During peak day-time periods that water will be released and used to generate electricity, replacing energy that would otherwise have to be generated on the Company's most inefficient and costly thermal generating units. The Federal Power Commission has found a major economic advantage accruing to the Company and its customers by virtue of the construction and operation of the Cornwall Project. That advantage still exists.


34. The Federal Power Commission further concluded that the Project will provide service reliability and peaking power to the system in a manner superior to any alternative available to the Company (FPC Opinion Finding No. 74).

FRANK D. McELWEE

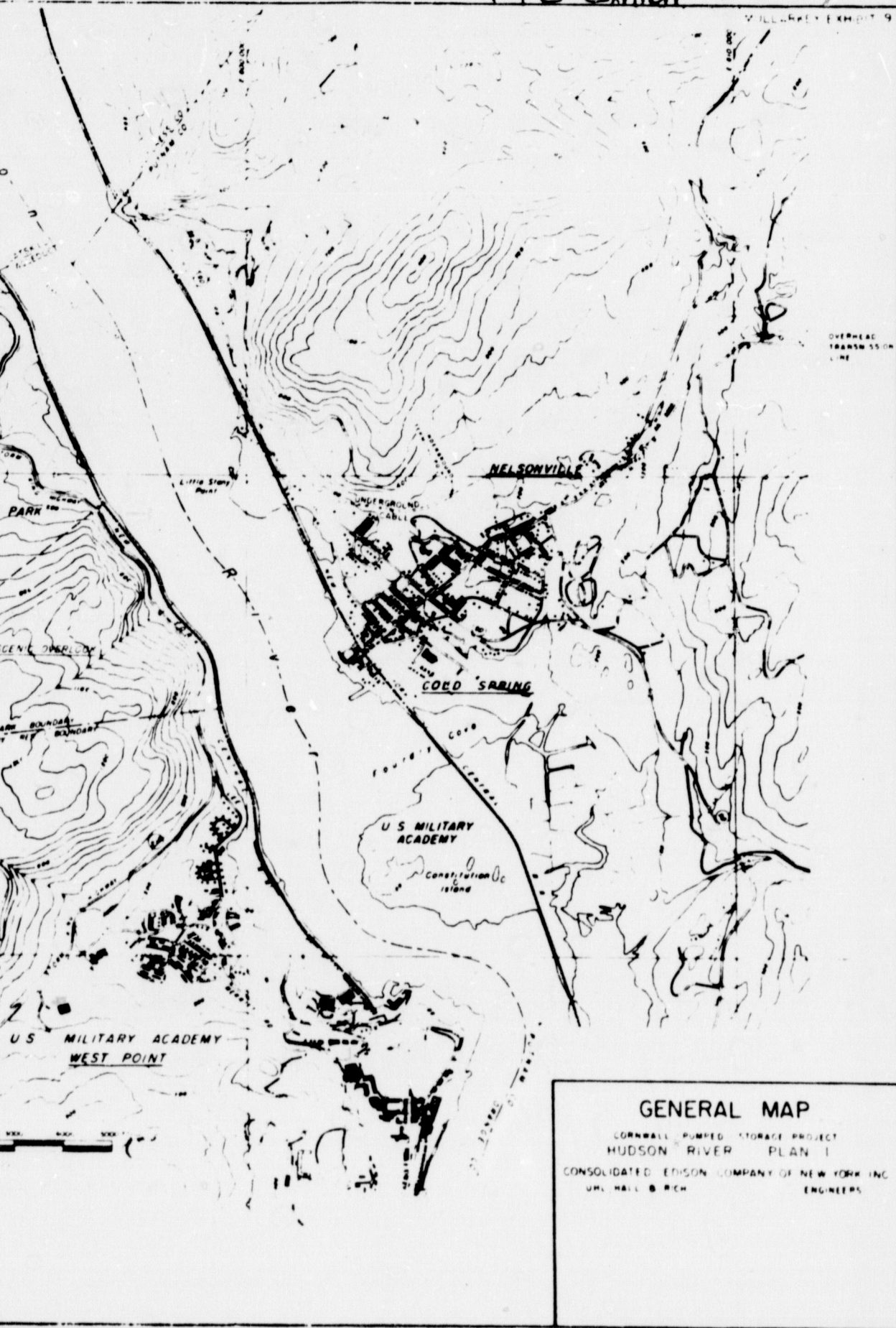
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EXHIBIT I ANNEXED TO AFFIDAVIT OF
FRANK D. McELWEE


(See opposite) 

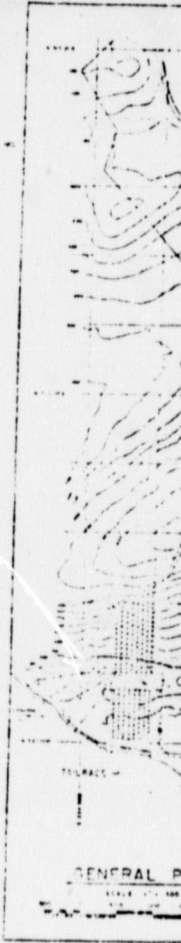


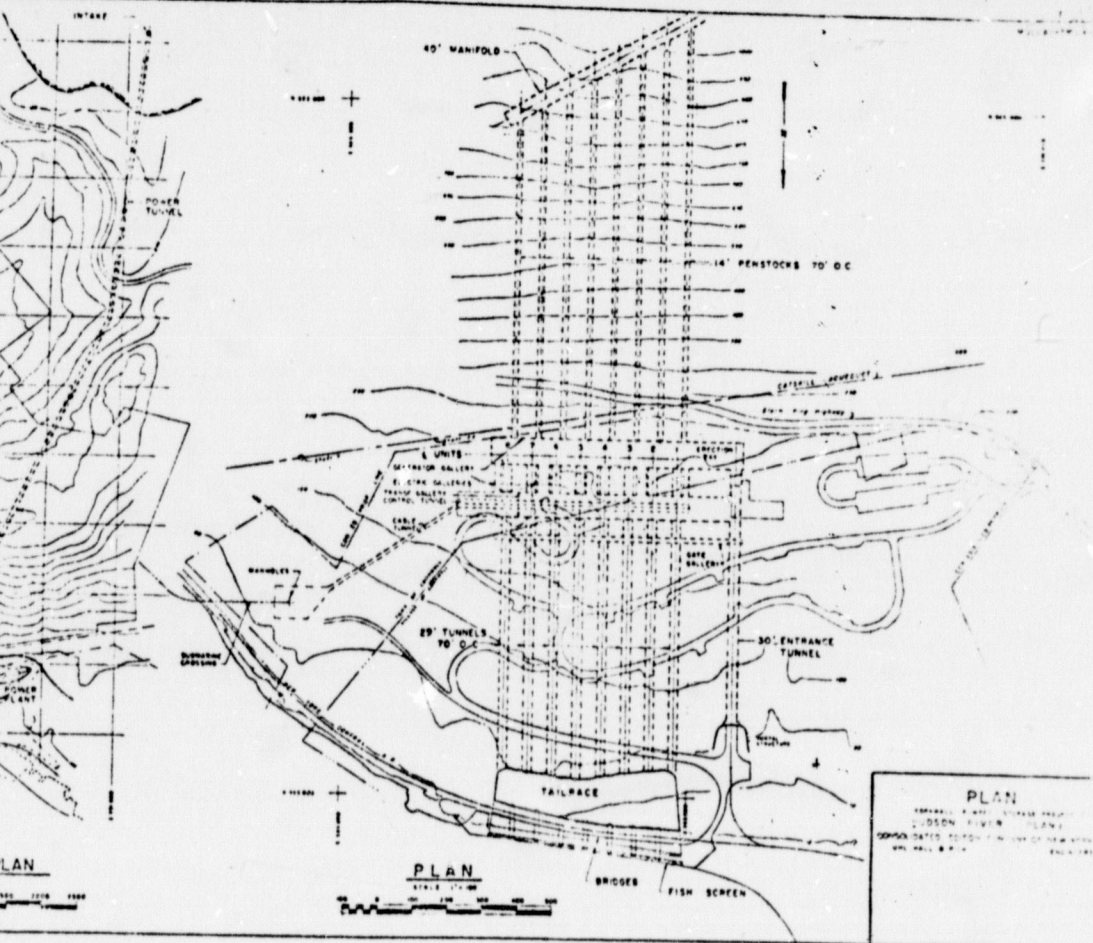


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EXHIBIT II ANNEXED TO AFFIDAVIT OF
FRANK D. McELWEE

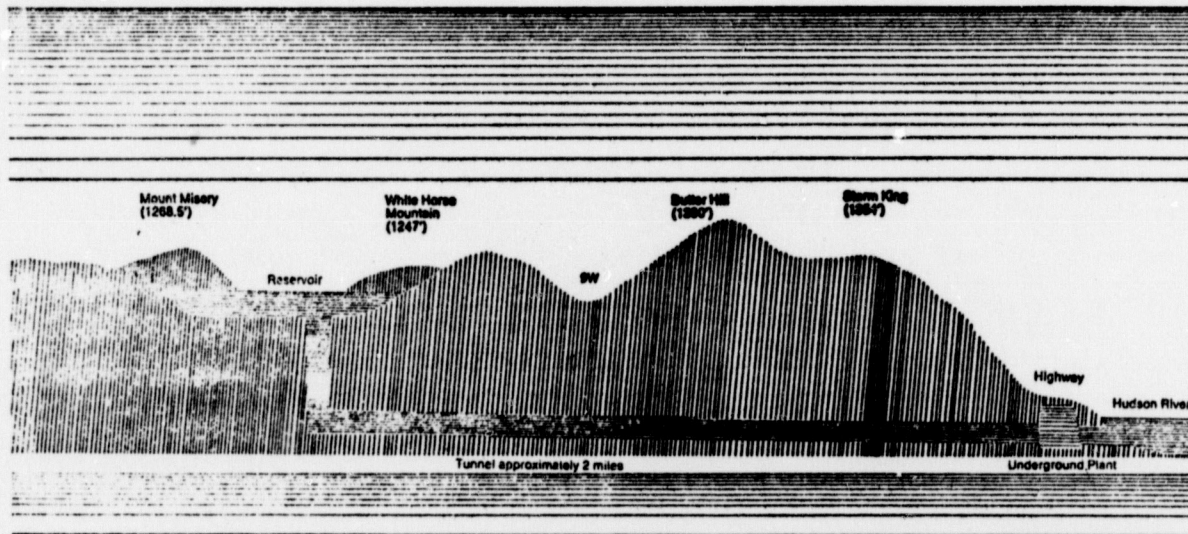
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EXHIBIT III ANNEXED TO AFFIDAVIT OF
FRANK D. McELWEE



Type of Project	Hydroelectric pumped storage facility.	Type of Construction	Complete undergrounding of Powerhouse; two-mile long underground concrete and steel-lined tunnel; storage reservoir 2 miles inland from Hudson River.	Reservoir Characteristics	240-acre surface located between Mt. Misery and White Horse Mountain, about one mile south of Storm King Mountain.
Location	Cornwall, New York, on the west bank of the Hudson River, 40 miles north of New York City.	Electrical Output	2 million kilowatts		
Purpose of Construction	To help meet peak and emergency demands for electricity in New York City and Westchester County.				

10/22/73
McElwEE, Jr.

**Notice of Motion (Supplemental) for Summary
Judgment and in Opposition to
Preliminary Relief**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

SIRS :

PLEASE TAKE NOTICE that, in addition to moving for summary judgment as set forth in its Notice of Motion dated October 23, 1973 herein, defendant Consolidated Edison Company of New York, Inc. will also move this Court, Hon. Morris E. Lasker, U.S.D.J., at the time and place set forth in the stipulation of counsel dated October 25, 1973 or as soon thereafter as counsel may be heard, upon the amended answer, counterclaim and cross claim, defendant Consolidated Edison's memorandum in opposition to plaintiffs' motion for preliminary relief and in support of motion for summary judgment dated October 23, 1973, and upon the other papers and pleadings referred to in said Notice of Motion dated October 23, 1973, for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, on defendant Consolidated Edison Company's cross claim for declaratory judgment against defendants Callaway, Gribble and Lombard for declaratory judgment declaring that §404 of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C.A. §1344) does not require defendant Consolidated Edison Company

*Notice of Motion (Supplemental) for Summary Judgment
and in Opposition to Preliminary Relief*

to apply to the Corps of Engineers and obtain a permit thereunder in order to construct project works in navigable waters licensed by the Federal Power Commission on August 19, 1970 in FPC Project No. 2338.

Dated: October 26, 1973
New York, New York

LEBOEUF, LAMB, LEIBY & MACRAE

By G. S. PETER BERGEN

A Member of the Firm

*Attorneys for Defendant Consolidated
Edison Company of New York, Inc.*

One Chase Manhattan Plaza

New York, New York 10005

(212) 422-6262

[To All Attorneys of Record.]

**Amended Answer, Counterclaim and Cross Claim
in Support of Motion for Summary Judgment**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

Defendant Consolidated Edison Company of New York, Inc. (Con Edison), by its attorneys LeBoeuf, Lamb, Leiby & MacRae, for its amended answer to the amended complaint herein.

First Defense

1. The amended complaint fails to state a claim upon which relief can be granted.

Second Defense

2. Admits with respect to paragraph 1 of the amended complaint that defendant Consolidated Edison Company of New York, Inc. ("Con Edison") plans to construct and operate a pump storage hydroelectric project at and near the Village of Cornwall on the west bank of the Hudson River in Orange County, New York (the "Project"), that construction of the Project will involve, among other things, construction activities in the Hudson River, that the Hudson River is a navigable water of the United States and that the plaintiffs purport to have brought this action for the purposes alleged in said paragraph 1.

*Amended Answer in Support of Motion
for Summary Judgment*

3. Admits that the jurisdiction of this Court is conferred by one or more of the statutes referred to in paragraph 2.

4. Admits the allegations of paragraph 3.

5. Denies with respect to paragraph 4 knowledge or information sufficient to form a belief as to the corporate status, objects and purposes of Scenic Hudson Preservation Conference or its membership and avers that, in an order and opinion of August 19, 1970, in FPC Project No. 2338, licensing the Project, the Federal Power Commission determined that the Project is "the best use of available resources to meet the requirements for electric energy with [a] minimum adverse impact on [the] environment" that "no alternative could so well meet the requirements with lesser detriment to [the] environment"; and that on appeal to the Second Circuit Court of Appeals the Court found that the "exhaustive environmental findings" contained in said Federal Power Commission's opinion and order demonstrated "full compliance with the National Environmental Policy Act".

6. Admits that the Hudson River Fishermen's Association ("Fishermen's Association") is a non-profit membership corporation organized and operating under the laws of the State of New York and denies knowledge or information sufficient to form a belief as to the objects and purpose of the Fishermen's Association or its membership and denies each and every other allegation of paragraph 5.

7. Admits that the Sierra Club is a non-profit organization organized and operating under the laws of the State

*Amended Answer in Support of Motion
for Summary Judgment*

of California and has a nation-wide membership, denies knowledge or information sufficient to form a belief as to the principal objectives and purposes of the Sierra Club or of the activities of the Atlantic Chapter thereof and denies each and every other allegation of paragraph 6.

8. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 7.

9. Admits the allegations of paragraph 8, except denies that Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Federal Water Pollution Control Act Amendments of 1972 apply to the Project.

10. Admits the allegations of paragraph 9.

11. Denies that all of the Project would be located on the Hudson River and except as so denied, admits the allegations of paragraph 10.

12. Admits the allegations of paragraph 11.

13. Denies the allegations of paragraph 12 insofar as it relates to the excavation from or depositing of material in connection with the construction of the Project.

14. Admits with respect to paragraph 13, that in 1963 and 1965, after the Project was initially licensed by the Federal Power Commission, Con Edison applied to the Corps of Engineers of the U.S. Army for permits to undertake activities in navigable waters of the United States but avers that it was not required to make such applications.

*Amended Answer in Support of Motion
for Summary Judgment*

15. Admits the allegations of paragraph 14.
16. Admits the allegations of paragraph 15.
17. Admits the allegations of paragraph 16.
18. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 17.
19. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 18.
20. Denies the allegations of paragraph 19.
21. Denies the allegations of paragraph 20.
22. Denies the allegations of paragraph 21.
23. Denies that the commencement of construction referred to in paragraph 22 will involve the depositing of fill material into a navigable water of the United States and except as so denied, admits the allegations of paragraph 22.
24. Denies the allegations of paragraph 23.
25. Repeats the answers to paragraphs 1 through 23.
26. Denies that the Corps of Engineers has promulgated regulations as alleged in paragraph 25 and admits that the Corps of Engineers has published proposed new regulations, that said proposed regulations contain, in part, the

*Amended Answer in Support of Motion
for Summary Judgment*

language alleged in paragraph 25, and that said language has been proposed as 33 C.F.R. §209.120(c)(6).

27. Denies the allegations of paragraph 26.

28. Denies the allegations of paragraph 27.

29. Repeats the answers to paragraphs 1 through 11, 13 through 18 and 25.

30. Denies that the sections of the Federal statutes referred to in paragraph 29 are applicable to hydroelectric projects licensed by the Federal Power Commission pursuant to Section 4(e) of the Federal Power Act 16 U.S.C. §797(e) and, except as so denied, admits the allegations of paragraph 29.

31. Denies that the language quoted in paragraph 30 is that of a published final regulation of the Corps of Engineers and admits that said language has been proposed by the Corps of Engineers as part of a regulation to be designated 33 CFR §209.120(c)(6).

32. Denies that the statute and proposed regulations referred to in paragraphs 30 and 31 apply to the activities described in paragraph 31 and except as so denied admits the allegations of paragraph 31.

33. Denies that permits referred to in paragraph 32 are required to be applied for or received by Con Edison and except as so denied admits the allegations of paragraph 32.

*Amended Answer in Support of Motion
for Summary Judgment*

34. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 33.

35. Denies the allegations of paragraph 34.

36. Denies the allegations of paragraph 35.

37. Denies the allegations of paragraph 36.

38. Admits that Con Edison will shortly proceed to construction of the Project without permits under Section 404, avers that until late in the summer of 1974 said construction will not involve the placement of rock in, or excavation of, the bed of the Hudson River, and denied knowledge or information sufficient to form a belief as to the remaining allegations of paragraph 37.

39. Denies the allegations of paragraph 38.

Counterclaim and Cross Claim Against Defendants Callaway, Gribble and Lombard for Declaratory Judgment

Defendants Consolidated Edison Company of New York, Inc. for its counterclaim and its cross claim against defendants Callaway, Gribble and Lombard for a declaratory judgment, pursuant to 28 U.S.C. §§2201 and 2202, that neither Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. §403) nor §404 of the Water Pollution Control Act Amendments of 1972 (33 U.S.C. §1344), requires Con Edison to apply to the Corps of Engineers in order to construct the Project, alleges:

*Amended Answer in Support of Motion
for Summary Judgment*

40. Repeats and realleges all of the allegations of the amended complaint not denied in this amended answer.

41. On April 9, 1973 defendant Con Edison received a letter dated 3 April, 1973 from defendant Lombard, a copy of which is attached hereto as Exhibit 1.

42. On October 23, 1973 defendant Con Edison received a letter dated 16 October, 1973 from defendant Lombard, a copy of which is attached hereto as Exhibit 2.

43. The position taken by defendant Lombard, and apparently by defendants Callaway and Gribble, in the letter dated 16 October, 1972 (Exhibit 2 hereof) is contrary to law to the extent that it asserts that defendant Con Edison is required to obtain a permit from the Corps of Engineers pursuant to §404 of the Federal Water Pollution Control Act of 1972 (33 U.S.C. §1344) for work in the waters of the Hudson River in connection with the construction of FPC Project No. 2338 (the Cornwall Project).

44. Such letter of October 16, 1973 (Exhibit 2 hereof) constitutes final agency action.

45. If Con Edison were to apply for a permit under §404, even though not lawfully required to do so, it would be subjected to continued and vexatious litigation by the plaintiffs in the form of plaintiffs' appearance before the Corps of Engineers in opposition to the issuance of said

*Amended Answer in Support of Motion
for Summary Judgment*

§404 permit, and in the form of appeals to the full extent permitted by law taken from any action by the said Corps of Engineers. The administrative proceedings and appellate review proceedings which would arise out of such an application by Con Edison for §404 permit would subject construction and completion of the Cornwall Project to further delays.

46. Each month of delay in completion of the Cornwall Project forces Con Edison, and ultimately the ratepayers, to pay the carrying charges on non-productive capital and investment. To date, Con Edison has invested over \$24 million in the Cornwall Project. Its carrying charges on this amount are in excess of \$100,000 per month.

47. Defendants Callaway, Gribble and Lombard, based on the position taken in the letter of defendant Lombard dated 16 October, 1973 (Exhibit 2 hereof), would attempt to subject defendant Con Edison to one or more of the sanctions or penalties provided for in the Federal Water Pollution Control Act Amendments of 1972 for violation of said Amendments, if defendant Con Edison were to go forward with construction of certain parts of the Project without first obtaining a permit pursuant to §404.

48. Defendant Con Edison is required by the Federal Power Act and its license issued thereunder, especially Article 37 thereof, to construct that part of the Project known as the project recreational park area.

*Amended Answer in Support of Motion
for Summary Judgment*

49. There exists, by reason of the facts hereinabove alleged, an actual controversy between Con Edison and plaintiff, and between Con Edison and defendants Callaway, Gribble and Lombard.

WHEREFORE, defendant Consolidated Edison Company of New York, Inc. prays for judgment:

A. Declaring that neither Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. §403) nor §404 of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. §1344) require it to apply to the Corps of Engineers in order to construct the project works in navigable waters licensed by the Federal Power Commission on August 19, 1970 in FPC Project No. 2338, and

B. Dismissing the amended complaint herein with the costs and disbursements of this action, and

C. Granting such other relief as to this Court may seem just and proper.

LEBOEUF, LAMB, LEIBY & MACRAE
*Attorneys for Defendant Consolidated
Edison Company of New York, Inc.*
One Chase Manhattan Plaza
New York, New York 10005
Telephone (212) 422-6262

By G. S. PETER BERGEN

EXHIBIT 1 ANNEXED TO AMENDED ANSWER

3 April 1973

NANOP-E

Consolidated Edison Company of
New York, Inc.
Attn: Carl L. Newman, Vice President
4 Irving Place
New York, New York 10003

Gentlemen:

Reference is made to your letter dated 5 February 1973 requesting a determination by my office as to whether a Department of the Army permit would be required under Section 404 of Public Law 92-500 the "Federal Water Pollution Control Act Amendments of 1972," as a consequence of certain construction activities related to the construction of a pumped storage hydroelectric project at Storm King Mountain, Cornwall, New York.

Your attention is invited to the inclosed copy of a letter dated 9 March 1973 to Mr. E. G. Woodbury, Senior Vice President, Consolidated Edison of New York, Inc. from J. W. Matwiz, Major General, U. S. A., Director of Civil Works, Office of the Chief of Engineers. As stated in this letter the position of the Corps of Engineers, that the authorization for the Storm King project and related activities will be given through FPC procedures, and that Corps participation will be by way of comments to the

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Exhibit 1 Annexed to Amended Answer

FPC, will remain unchanged at the present time. Therefore, separate permits for this project will not be necessary.

Sincerely yours,

HARRY W. LOMBARD
Colonel, Corps of Engineers
District Engineer

1 Incl.

Cpy ltr dtd 9 March '73
frm Gen. Morris to Mr.
Woodbury

EXHIBIT 2 ANNEXED TO AMENDED ANSWER

(Letterhead of Department of the Army)

16 October 1973

NANOP-E

Consolidated Edison Company of
New York, Inc.

ATTN: Mr. Carl L. Newman, Vice President
4 Irving Place
New York, New York 10003

Gentlemen:

Reference is made to the proposed construction by Consolidated Edison Company of New York of a pumped storage hydroelectric project on the Hudson River at Storm King Mountain, Cornwall, New York.

Further reference is made to Civil Action 73 Civ 4276, United States District Court, Southern District of New York, Scenic Hudson Preservation Conference, et al, against United States of America and Consolidated Edison Company of New York, Inc.

Proposed regulation 33 CFR 209.120 (c) (3), published in Federal Register, 10 May 1973, at page 12213, requires Department of the Army permits under Section 404 of the Federal Water Pollution Control Act, in all cases involving the discharge of dredged or fill material into navigable waters. The proposed regulations provide interim guidance on the processing of permit applications.

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Exhibit 2 Annexed to Amended Answer

Accordingly, confirming telephone advice of 13 October 1973, to your Mr. Richard W. Clement, a Department of the Army permit will be required for work done at the project as provided in the cited regulations.

Sincerely yours,

Colonel, Corps of Engineers
HARRY W. LOMBARD
District Engineer

**Notice of Motion for Order Dismissing
Amended Complaint**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

SIRS :

PLEASE TAKE NOTICE that upon the Amended Complaint, the affidavit of T. Gorman Reilly sworn to on the 24th day of October 1973, and all of the proceedings hereto, the undersigned will move this Court in Room 2903, United States Courthouse, Foley Square, New York, New York, on the 2nd day of November 1973 at 10:00 A.M. o'clock, or as soon thereafter as counsel can be heard, for an order pursuant to Rule 12(b)(5) of the Federal Rules of Civil Procedure dismissing the Amended Complaint for failure to state a claim upon which relief can be granted and further with respect to the Third Claim for Relief for mootness.

Dated: New York, New York
October 24, 1973

Yours, etc.,

PAUL J. CURRAN

*United States Attorney for the
Southern District of New York,
Attorney for Defendants
Callaway, Gribble and Lombard*

By: T. GORMAN REILLY

Assistant United States Attorney

[To All Attorneys of Record]

**Affidavit of T. Gorman Reilly in Support of Motion
for Order Dismissing Amended Complaint and in
Opposition to Motion for Preliminary Relief**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

STATE OF NEW YORK,
COUNTY OF NEW YORK,
SOUTHERN DISTRICT OF NEW YORK, ss.:

T. GORMAN REILLY, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Paul J. Curran, United States Attorney for the Southern District of New York, attorney for the three named Army defendants in this action; as such I am in charge of and am familiar with the facts of this case.

2. I make this affidavit in support of the Army defendants' motion to dismiss the Amended Complaint and in opposition to the plaintiffs' motion for a preliminary injunction.

FIRST APPLICATION FOR LICENSE

3. Following the submission of an application by the Consolidated Edison Company of New York, Inc. (hereinafter "Con Ed") to the Federal Power Commission for a license to construct and operate a pumped storage hydro-

*Affidavit of T. Gorman Reilly in Support of Motion for
Order Dismissing Amended Complaint and in Opposition
to Motion for Preliminary Relief*

electric project at Cornwall, New York (hereinafter "the Storm King Project"), the Federal Power Commission, by letter dated February 27, 1963, requested the United States Army Corps of Engineers to review the plans of the proposed structures in so far as they affected navigation. This request was made by the Federal Power Commission pursuant to Section 4(e) of the Federal Water Power Act of 1920, 16 U.S.C. § 797. A copy of the letter from the Federal Power Commission to the Army Corps of Engineers is annexed as Exhibit "A" to this affidavit.

4. The Army Corps of Engineers reviewed the plans of the structures set forth in the Con Ed application for the Storm King Project and by letter dated June 7, 1963 determined that "the plans of the structures affecting navigation [were] satisfactory". A copy of this letter is annexed as Exhibit "B" to this affidavit.

FIRST ARMY PERMIT

5. On December 31, 1963 the District Engineer, New York District, U. S. Army Corps of Engineers, issued a permit to Con Ed pursuant to Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, authorizing certain dredging in connection with the Storm King Project. The permit expired by its own terms on December 31, 1966. A copy of this permit is annexed as Exhibit "C" to this affidavit.

*Affidavit of T. Gorman Reilly in Support of Motion for
Order Dismissing Amended Complaint and in Opposition
to Motion for Preliminary Relief*

6. On March 9, 1965 the Federal Power Commission issued a license to Con Ed for the Storm King Project, specifically noting that the Chief of Engineers, U. S. Army Corps of Engineers, found the project to be satisfactory as far as the interests of navigation were concerned. 33 F.P.C. 428, 451.

SECOND ARMY PERMIT

7. On June 10, 1965 the District Engineer, New York District, U. S. Army Corps of Engineers issued a permit to Con Ed in connection with the Storm King Project pursuant to Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, authorizing it to install a pipe-type electrical cable crossing along the bottom of the Hudson River. This permit expired by its own terms on December 31, 1968. A copy of this permit is annexed as Exhibit "D" to this affidavit.

THIRD ARMY PERMIT

8. On October 26, 1965 the District Engineer, New York District, U. S. Army Corps of Engineers, issued a permit to Con Ed in connection with the Storm King Project pursuant to Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, authorizing Con Ed to place fill in the Hudson River to be used for the creation of a waterside park site. This permit expired of its own terms on December 31, 1968. A copy of the permit is annexed as Exhibit "E" to this affidavit.

*Affidavit of T. Gorman Reilly in Support of Motion for
Order Dismissing Amended Complaint and in Opposition
to Motion for Preliminary Relief*

9. The order of the Federal Power Commission licensing the Storm King Project was set aside by the United States Court of Appeals for the Second Circuit on December 29, 1965. *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

10. On remand, the amended application of Con Ed for the Storm King Project was again referred to the Corps of Engineers for review. A letter from the Federal Power Commission dated June 17, 1966 seeking the approval of the Corps of Engineers for navigation structures is annexed as Exhibit "F" to this affidavit.

11. By letter dated July 29, 1966 the Army Corps of Engineers advised the Federal Power Commission that it found that "the plan of the structures affecting navigation [was] satisfactory". A copy of this letter is annexed as Exhibit "G" to this affidavit.

12. On August 19, 1970 the Federal Power Commission issued a license to Con Ed for the Storm King Project, following remand. The Commission noted that the Chief of Engineers, U. S. Army Corps of Engineers, found "that the project is satisfactory as far as the interests of navigation are concerned". At the Army's behest standard provisions in the interest of navigation were included as Articles 1 through 29 of the license. 44 FPC 350, 388, 432. These standard provisions are set forth in the Commis-

*Affidavit of T. Gorman Reilly in Support of Motion for
Order Dismissing Amended Complaint and in Opposition
to Motion for Preliminary Relief*

sion's Form L-4 (revised June 1, 1964) entitled "Terms and Conditions of License for Unconstructed Project Affecting Navigable Waters of the United States". 33 FPC 839.

13. On October 22, 1971 the United States Court of Appeals for the Second Circuit approved the issuance of the license by the Federal Power Commission for the Storm King Project, *Scenic Hudson Preservation Conference v. Federal Power Commission*, 453 F.2d 463 (2d Cir. 1971), rehearing and en banc hearing denied (1971), cert. denied, 407 U.S. 926 (1972).

SECTION 404 RULINGS

14. On April 3, 1973 in response to an inquiry from Con Ed whether a permit would be required for the Storm King Project under Section 404 of the Federal Water Pollution Control Act Amendments of 1972, Colonel Harry W. Lombard, New York District Engineer, U. S. Army Corps of Engineers, stated by letter that separate permits—other than those obtained through the licensing procedures of the Federal Power Commission—would not be required. (A copy of this letter is annexed as Exhibit "H" to this affidavit.) The position of the Army Corps of Engineers with respect to this question was conveyed to the attorneys for plaintiffs by letter of March 27, 1973, a copy of which has been annexed as Exhibit "A" to the Amended Complaint. The District Engineer further noted in this letter that the three Section 10 permits previously issued by the Corps

*Affidavit of T. Gorman Reilly in Support of Motion for
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to Motion for Preliminary Relief*

(described in ¶¶ 5, 7 & 8 *supra*) "may possibly have been in error."

15. On May 10, 1973 the Army Corps of Engineers published proposed rules in the Federal Register with respect to permits for activities in navigable waters. 38 F.R. 12217-12230. The notice accompanying the proposed rules stated that until final regulations are promulgated, the proposed rules will provide interim guidance to all Corps of Engineers installations in the processing of permits. Specific attention was given in § 209.120(c)(6) of the proposed rules to the Federal Water Power Act of 1920. The long standing practice of taking no action with respect to Section 10 permits when a license was being sought by an applicant from the Federal Power Commission was re-affirmed. However, with respect to Section 404 of the Federal Water Pollution Control Act Amendments of 1972 the proposed rule provides as follows:

"In all cases involving the discharge of dredged or fill material into navigable waters or the transportation of dredged material for the purpose of dumping in ocean waters, Department of the Army permits under Section 404 of the Federal Water Pollution Control Act, or under section 10 of the Marine Protection Research and Sanctuaries Act of 1972 will be required." 38 F.R. 12217, 12218.

16. By letter dated October 16, 1973, Colonel Harry W. Lombard, New York District Engineer, U. S. Army Corps

*Affidavit of T. Gorman Reilly in Support of Motion for
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to Motion for Preliminary Relief*

of Engineers, formally notified Con Ed that a Section 404 permit would be required for the discharge of dredged or fill material into the navigable waters in connection with the Storm King Project. A copy of this letter is annexed as Exhibit "I" hereto.

WHEREFORE, it is respectfully urged that plaintiffs' motion for a preliminary injunction should be denied and that the motion of the Army defendants to dismiss the Amended Complaint should be granted.

T. GORMAN REILLY
Assistant United States Attorney

(Jurat omitted in printing.)

EXHIBIT "A" ANNEXED TO AFFIDAVIT OF
T. GORMAN REILLY

Project No. 2338—New York
Consolidated Edison Company of New York, Inc.

2/27/63

Chief of Engineers
Department of the Army
Washington 25, D.C.

Dear Sir:

Consolidated Edison Company of New York, Inc., of New York, New York, has filed with the Commission an application for license for proposed hydroelectric Project No. 2338, to be located on the Hudson River in Orange County, New York.

The project is briefly described in the enclosed statement dated February 1, 1963.

Two copies of the application with exhibits including reduced copies of maps and drawings are enclosed, and three sets of prints of the following maps and drawings are being sent to you under separate cover:

Exhibit J: (FPC No. 2338-1)
Exhibit M: (FPC No. 2338-2)
Exhibit L: (FPC Nos. 2338-3 and -4)

If you find the plans of the structures affecting navigation to be satisfactory, it is requested that you so inform the Commission and that you recommend for insertion in any license issued, such terms and conditions as you consider necessary in the interest of navigation.

We shall send you the tracings at a later date for approval in accordance with Section 4(e) of the Federal Power Act.

Please let us have your reply within 90 days, or notice that you need additional time to reply.

Please return one copy of the application with your reply.

Very truly yours,

/s/ GORDON M. GRANT
Acting Secretary

4 Enclosures

EXHIBIT "B" ANNEXED TO AFFIDAVIT OF
T. GORMAN REILLY

HEADQUARTERS
DEPARTMENT OF THE ARMY
Office of the Chief of
Engineers
Washington 25, D.C.

Chairman
Federal Power Commission
Washington 25, D.C.

Dear Mr. Chairman:

Reference is made to the Commission's letter dated 11 March 1963 concerning the application for license filed by Consolidated Edison Company of New York, Incorporated, for proposed hydroelectric Project No. 2338 to be located on the Hudson River in Orange County, New York.

It is considered that the applicant's proposed project would not significantly affect navigation. However, in order to protect the interests of navigation, it is recommended that the provisions in the interest of navigation included in Articles 8, 13 and 18 of the Commission's Form I-4, dated 15 December 1953, be inserted in the license if issued.

The plans of the structures affecting navigation are satisfactory.

One copy of the application is returned as requested.

Sincerely yours,

/s/ ROBERT C. MARSHALL
Colonel, Corps of Engineers
Assistant Director of Civil Works
for Eastern Divisions

Enc.
Application

EXHIBIT "C" ANNEXED TO AFFIDAVIT OF T. GORMAN REILLY

DEPARTMENT OF THE ARMY

CHARMATA/AS
226

NOTE: It is to be understood that this instrument does not give any property rights either in real estate or material, nor any exclusive privileges, nor that it does not authorize any injury to private property or invasion of private rights, nor does it constitute a grant of Federal, State, or local laws or regulations, nor does it obviate the necessity of obtaining permits issued by the proper authorities. It merely expresses the consent of the Federal Government to the exercise of the public right of navigation. (See *Cook v. Mingo*, 11 Chicago, 188 U.S., 410.)

PERMIT
U.S. Army Engineer District, New York
Corps of Engineers
111 East 10th Street, New York, N.Y. 10003
31 December, 1963

NANOP-E

Consolidated Edison Company of New York
4 Irving Place
New York 3, New York

PINATA
139

Gentlemen:

GELBERMAN
223

Referring to written request dated 19 September 1963, signed by T.R.

Galloway, Structural Engineer,-----

I have to inform you that, upon the recommendation of the Chief of Engineers, and under the provisions of Section 10 of the Act of Congress approved March 3, 1899, entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," you are hereby authorized by the Secretary of the Army.

to dredge to a depth of twenty-five (25) feet below mean low water;
(Here describe the proposed structure or work.)
the dredged material, approximately 55,000 cubic yards, is to be deposited at an approved Government dumping ground under a permit to be obtained from the Supervisor of New York Harbor,-----

in Hudson River,-----

(Here to be named the river, harbor, or waterway concerned.)

at Town of Cornwall, Orange County, New York,-----

(Here to be named the nearest well-known locality, preferably a town or city, and the distance in miles and tenths from some definite point to the same, stating whether above or below or giving direction by points of compass.)

In accordance with the plans shown on the drawing attached hereto and marked:
(On drawings, give file number or other definite identification marks.)

1507-24 Hudson River-Consolidated Edison Co. of N.Y.-Dredge at Cornwall,-----

subject to the following conditions:

ONLY COPY AVAILABLE

Exhibit "C" Annexed to Affidavit of T. Gorman Reilly

1. The work herein authorized shall be subject to the supervision and approval of the District Engineer, Corps of Engineers, New York Harbor District. He may temporarily suspend the work at any time, if in his judgment the interests of navigation require it.

2. The work herein authorized shall be subject to the supervision and approval of the District Engineer, Corps of Engineers, New York Harbor District. He may temporarily suspend the work at any time, if in his judgment the interests of navigation require it.

3. The work herein authorized shall be subject to the supervision and approval of the District Engineer, Corps of Engineers, New York Harbor District. He may temporarily suspend the work at any time, if in his judgment the interests of navigation require it.

4. The work herein authorized shall be subject to the supervision and approval of the District Engineer, Corps of Engineers, New York Harbor District. He may temporarily suspend the work at any time, if in his judgment the interests of navigation require it.

5. The work herein authorized shall be subject to the supervision and approval of the District Engineer, Corps of Engineers, New York Harbor District. He may temporarily suspend the work at any time, if in his judgment the interests of navigation require it.

6. The work herein authorized shall be subject to the supervision and approval of the District Engineer, Corps of Engineers, New York Harbor District. He may temporarily suspend the work at any time, if in his judgment the interests of navigation require it.

7. The work herein authorized shall be subject to the supervision and approval of the District Engineer, Corps of Engineers, New York Harbor District. He may temporarily suspend the work at any time, if in his judgment the interests of navigation require it.

8. The work herein authorized shall be subject to the supervision and approval of the District Engineer, Corps of Engineers, New York Harbor District. He may temporarily suspend the work at any time, if in his judgment the interests of navigation require it.

9. The work herein authorized shall be subject to the supervision and approval of the District Engineer, Corps of Engineers, New York Harbor District. He may temporarily suspend the work at any time, if in his judgment the interests of navigation require it.

10. The work herein authorized shall be subject to the supervision and approval of the District Engineer, Corps of Engineers, New York Harbor District. He may temporarily suspend the work at any time, if in his judgment the interests of navigation require it.

- (c) That there shall be no unreasonable interference with navigation by the work herein authorized.
- (d) That, if any reason or any other operations by the United States are necessary in the interest of navigation, all expense incurred therefor shall be borne by the permittee.
- (e) That no person shall be permitted by the permittee or the owner to forbid the full and free use by the public of all navigable waters adjacent to the work or structure.
- (f) That if future operations by the United States require an alteration in the position of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army, it shall cause unreasonable obstruction to the free navigation of such water, the owner will be required upon due notice from the Secretary of the Army, to remove or alter the structural work or obstructions caused thereby without expense to the United States, so as to render navigation reasonably free, easy, and unobstructed; and if, upon the expiration or revocation of this permit, the structure, fill, excavation, or other modification of the watercourse hereby authorized shall not be completed, the owners shall, without expense to the United States, and to such extent and in such time and manner as the Secretary of the Army may require, remove all or any portion of the uncompleted structure or fill and restore to its former condition the navigable capacity of the watercourse. No claim shall be made against the United States on account of any such removal or alteration.
- (g) That the United States shall in no case be liable for any damage or injury to the structure or work herein authorized which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation, or for other purposes, and no claim or right to compensation shall accrue from any such damage.
- (h) That if the display of lights and signals on any work hereby authorized is not otherwise provided for by law, such lights and signals as may be prescribed by the U. S. Coast Guard, shall be installed and maintained by and at the expense of the owner.
- (i) That the permittee shall notify the said district engineer at what time the work will be commenced, and as far in advance of the time of commencement as the said district engineer may specify, and shall also notify him promptly, in writing, of the commencement of work, suspension of work, if for a period of more than one week, resumption of work, and its completion.
- (j) That if the structure or work herein authorized is not completed on or before 31st day of December, 19 66, this permit, if not previously revoked or specifically extended, shall cease and be null and void.

Copies furnished:
Area Engineer
Hud Valley Area

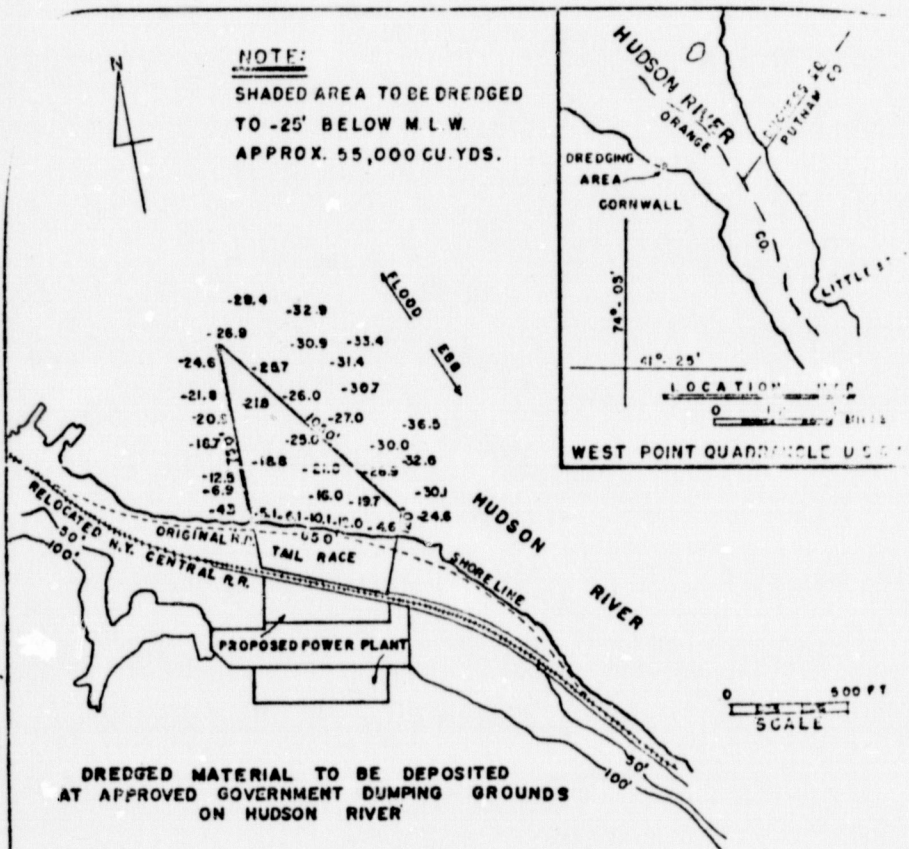
Mr. Charles H. Jennings
Assistant Counsel
Office of General Services
Bureau of Surplus Real Property
103 Washington Ave
Albany, N.Y.
(each w/dwg)

By authority of the Secretary of the Army:

H. M. MILITICH
Colonel, Corps of Engineers
District Engineer

ONLY COPY AVAILABLE

Exhibit "C" Annexed to Affidavit of T. Gorman Reilly



PROPOSED DREDGING
 IN HUDSON RIVER, CORNWALL
 ORANGE COUNTY, NEW YORK
 BY CONSOLIDATED EDISON CO.
 DATED 10 1973

EXHIBIT "D" ANNEXED TO AFFIDAVIT OF T. GORMAN REILLY

THE COPY HERE
DEPARTMENT OF THE ARMY

Not to be construed as a grant of this instrument does not give any property rights either in real estate or in the right of way, exclusive privilege, and that it does not authorize any injury to private property or invasion of private rights, or any infringement of Federal, State, or local laws or regulations, nor does it obviate the necessity of obtaining State assent to the work authorized. It merely expresses the assent of the Federal Government so far as concerns the public rights of navigation. (See *Cummings v. Chicago*, 188 U.S., 410.)

NAHOP-E

PERMIT
U.S. Army Engineer District, New York
111 East 16th St., New York, N.Y. 10003
Corps of Engineers
10 June 1965

Consolidated Edison Co. of New York, Inc.
4 Irving Place
New York, N. Y. 10003

EXEC ASS

DJE

DE

Gentlemen:

Referring to written request dated 27 April 1965, signed by Mr. E.G.

Watkins, Structural Engineer, - - - - -

I have to inform you that, upon the recommendation of the Chief of Engineers, and under the provisions of Section 10 of the Act of Congress approved March 3, 1899, entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," you are hereby authorized by the Secretary of the Army.

to install a pipe-type electrical cable crossing; - - - - -
(Here describe the proposed structure or work.)

in Hudson River, - - - - -
(Here to be named the river, harbor, or waterway concerned.)

between Cornwall, Orange County, and Philipstown, Putnam County,
(Here to be named the nearest well-known locality--preferably a town or city--and the distance in miles and tenths from some definite point to the same, stating whether above or below or giving direction by points of compass.)

New York, - - - - -

in accordance with the plans shown on the drawing attached hereto and marked:
(Or drawings; give file number or other definite identification marks.)

1507-24 (Hudson River--Consolidated Edison Co. of N.Y.--submarine
- - - - - pipeline bet. Cornwall & Philipstown); - -

subject to the following conditions:

Plotted
2/2/65

Exhibit "D" Annexed to Affidavit of T. Gorman Reilly

(a) That the work shall be subject to the supervision and approval of the District Engineer, Corps of Engineers, in charge of the locality, who may temporarily suspend the work at any time, if in his judgment the interests of navigation so require.

(b) That any material dredged to the prosecution of the work herein authorized shall be removed evenly and uniformly, refuse piles, ridges across the bed of the waterway, or deep holes that may have a tendency to cause injury to navigable channels or to the banks of the waterway shall be left. If any pipe, wire, or cable hereby authorized is laid in a trench, the formation of permanent ridges across the bed of the waterway shall be avoided and the back filling shall be so done as not to increase the cost of future dredging for navigation. Any material to be deposited or dumped under this authorization, either in the waterway or on shore above high-water mark, shall be deposited or dumped at the locality shown on the drawing hereto attached, and, if so prescribed thereon, within or behind a piling and substantial bulkhead or bulkheads, such as will prevent escape of the material in the waterway. If the material is to be deposited in the harbor of New York, or in its adjacent or tributary waters, or in Long Island Sound, a permit therefor must be previously obtained from the Supervisor of New York Harbor, New York City.

(c) That there shall be no unreasonable interference with navigation by the work herein authorized.

(d) That if inspections or any other operations by the United States are necessary in the interest of navigation, all expenses connected therewith shall be borne by the permittee.

(e) That no attempt shall be made by the permittee or the owner to forbid the full and free use by the public of all navigable waters at or adjacent to the work or structure.

(f) That if future operations by the United States require an alteration in the position of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army, it shall cause unreasonable obstruction to the free navigation of said water, the owner will be required upon due notice from the Secretary of the Army, to remove or alter the structural work or obstructions caused thereby without expense to the United States, so as to render navigation reasonably free, easy, and unobstructed; and if, upon the expiration or revocation of this permit, the structure, fill, excavation, or other modification of the watercourse hereby authorized shall not be completed, the owners shall, without expense to the United States, and to such extent and in such time and manner as the Secretary of the Army may require, remove all or any portion of the uncompleted structure or fill and restore to its former condition the navigable capacity of the watercourse. No claim shall be made against the United States on account of any such removal or alteration.

(g) That the United States shall in no case be liable for any damage or injury to the structure or work herein authorized which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation, or for other purposes, and no claim or right to compensation shall accrue from any such damage.

(h) That if the display of lights and signals on any work hereby authorized is not otherwise provided for by law, such lights and signals as may be prescribed by the U. S. Coast Guard, shall be installed and maintained by and at the expense of the owner.

(i) That the permittee shall notify the said district engineer at what time the work will be commenced, and as far in advance of the time of commencement as the said district engineer may specify, and shall also notify him promptly, in writing, of the commencement of work, suspension of work, if for a period of more than one week, resumption of work, and its completion.

(j) That if the structure or work herein authorized is not completed on or before the 31st day of December, 1963, this permit, if not previously revoked or specifically extended, shall cease and be null and void.

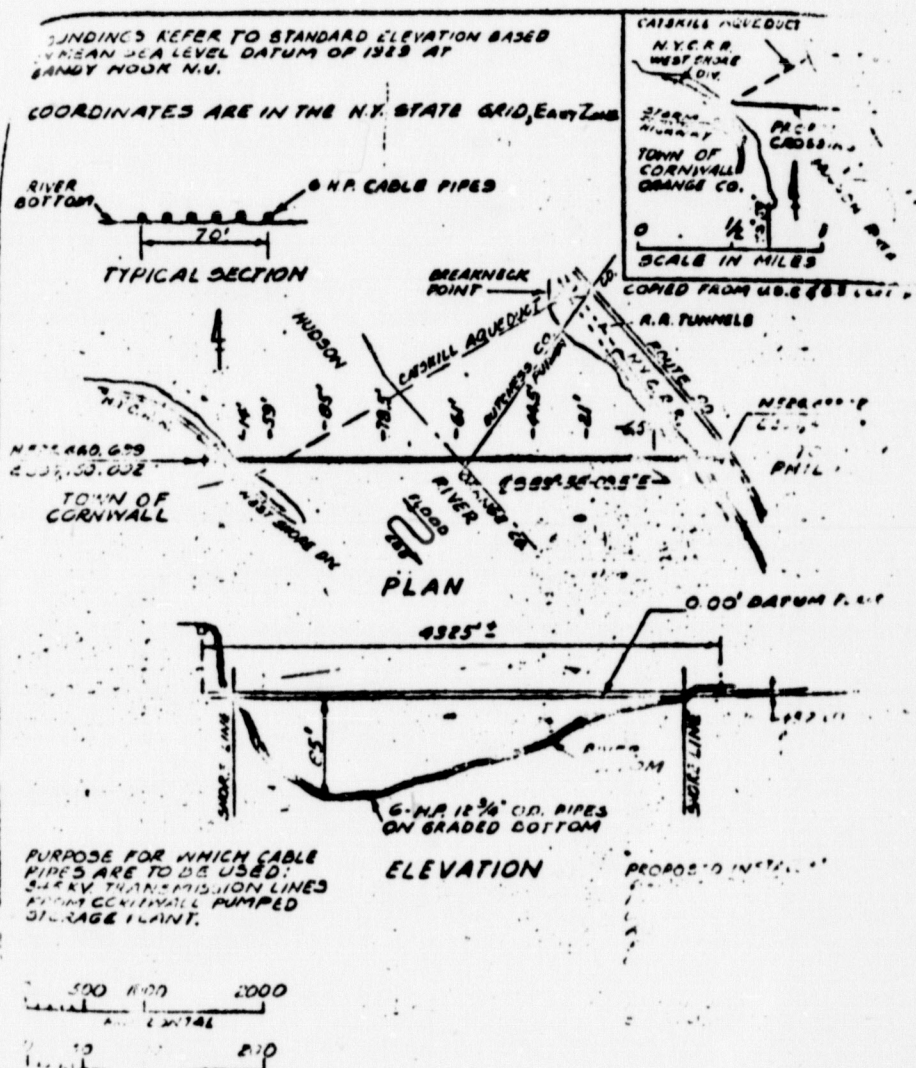
Copy furnished;
Mr Chas H. Jennings, Chief
Surplus Real Prop Bureau
Office of Gen Services
143 Washington Ave
Albany, NY 12210
(w/incl)

By authority of the Secretary of the Army:

M. H. Hillen
M. H. HILLEN
Colonel, Corps of Engineers
District Engineer

ONLY COPY AVAILABLE

Exhibit "D" Annexed to Affidavit of T. Gorman Reilly



ONLY COPY AVAILABLE

EXHIBIT "E" ANNEXED TO AFFIDAVIT OF T. GORMAN REILLY

DEPARTMENT OF THE ARMY

NOTE: It is to be understood that this instrument does not give any property rights either in real estate or material, or any exclusive privileges; and that it does not authorize any improper invasion of private property or invasion of private rights, or any infringement of Federal, State, or local laws or regulations, and does not obviate the necessity of obtaining State or local law or work authorized. IT HEREBY EXPRESSES THE ASSENT OF THE FEDERAL GOVERNMENT IN FAR AS CONCERNS THE PUBLIC RIGHTS OF NAVIGATION. (See *Cummings v. Chicago*, 190 U.S. 439.) 16-3105-8

MANOP-2

PERMIT

U. S. Army Engineer District, New York
111 East 104th Street, New York, N.Y. 10022
26 October, 1963
Chief of Engineers

Consolidated Edison Company of New York, Inc.
4 Irving Place
New York, N. Y. 10003

Gentlemen:

Referring to written request dated 28 October 1964, signed by Mr. T. R.

Galloway, Structural Engineer, - - - - -

I have to inform you that, upon the recommendation of the Chief of Engineers, and under the provisions of Section 10 of the Act of Congress approved March 3, 1899, entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," you are hereby authorized by the Secretary of the Army.

to place fill, - - - - -
(Here describe the proposed structure or work.)

in Hudson River, - - - - -
(Here to be named the river, harbor, or waterway concerned.)

at Cornwall-on-Hudson, Orange County, New York, - - - - -
(Here to be named the nearest well-known locality—preferably a town or city—and the distance in miles and tenths from some definite point in the same, stating whether above or below or giving direction in degrees of compass.)

in accordance with the plans shown on the drawing attached hereto and marked:
(Or drawings: Give the number or other definite identification.)

1507-24(Hudson River-Consolidated Edison Co. of N. Y.) - Fill at Cornwall-on-Hudson), - - - - -

subject to the following conditions:

1001 11-165-2

Exhibit "E" Annexed to Affidavit of T. Gorman Reilly

(a) That the work shall be subject to the supervision and approval of the District Engineer, Corps of Engineers, in charge of the locality, who may temporarily suspend the work at any time, if in his judgment the interests of navigation require.

(b) That any material dredged in the prosecution of the work herein authorized shall be removed evenly and to large refuse piles, placed across the bed of the waterway, or deep holes that may have a tendency to cause injury to navigation, except in the case of the work of the waterway shall be left. If any pipe, wire, or cable hereby authorized is laid in a trench, the formation of permanent ridges across the bed of the waterway shall be avoided and the back filling shall be so done as not to increase the cost of future dredging for navigation. Any material to be deposited or dumped under this authorization, either in the waterway or on shore above high water mark, shall be deposited or dumped at the locality shown on the drawing hereto attached, and, if so prescribed thereon, within or behind a good and substantial barrier or bulkhead, such as will prevent escape of the material in the waterway. If the material is to be deposited in the harbor of New York, or in its adjacent or tributary waters, or in Long Island Sound, a permit therefor must be previously obtained from the Supervisor of New York Harbor, New York City.

(c) That there shall be no unreasonable interference with navigation by the work herein authorized.

(d) That if inspections or any other operations by the United States are necessary in the interest of navigation, all expenses connected therewith shall be borne by the permittee.

(e) That no attempt shall be made by the permittee or the owner to forbid the full and free use by the public of all navigable waters at or adjacent to the work or structure.

(f) That if future operations by the United States require an alteration in the position of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army, it shall cause unreasonable obstruction to the free navigation of said water, the owner will be required upon due notice from the Secretary of the Army, to remove or alter the structural work or obstructions caused thereby without expense to the United States, so as to render navigation reasonably free, easy, and unobstructed; and if, upon the expiration or revocation of this permit, the structure, fill, excavation, or other modification of the watercourse hereby authorized shall not be completed, the owners shall, without expense to the United States, and to such extent and in such time and manner as the Secretary of the Army may require, remove all or any portion of the uncompleted structure or fill and restore to its former condition the navigable capacity of the watercourse. No claim shall be made against the United States on account of any such removal or alteration.

(g) That the United States shall in no case be liable for any damage or injury to the structure or work herein authorized which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation, or for other purposes, and no claim or right to compensation shall accrue from any such damage.

(h) That if the display of lights and signals on any work hereby authorized is not otherwise provided for by law, such lights and signals as may be prescribed by the U. S. Coast Guard, shall be installed and maintained by and at the expense of the owner.

(i) That the permittee shall notify the said district engineer at what time the work will be commenced, and as far in advance of the time of commencement as the said district engineer may specify, and shall also notify him promptly, in writing, of the commencement of work, suspension of work, if for a period of more than one week, resumption of work, and its completion.

(j) That if the structure or work herein authorized is not completed on or before the 31st day of December, 19 68, this permit, if not previously revoked or specifically extended, shall cease and be null and void.

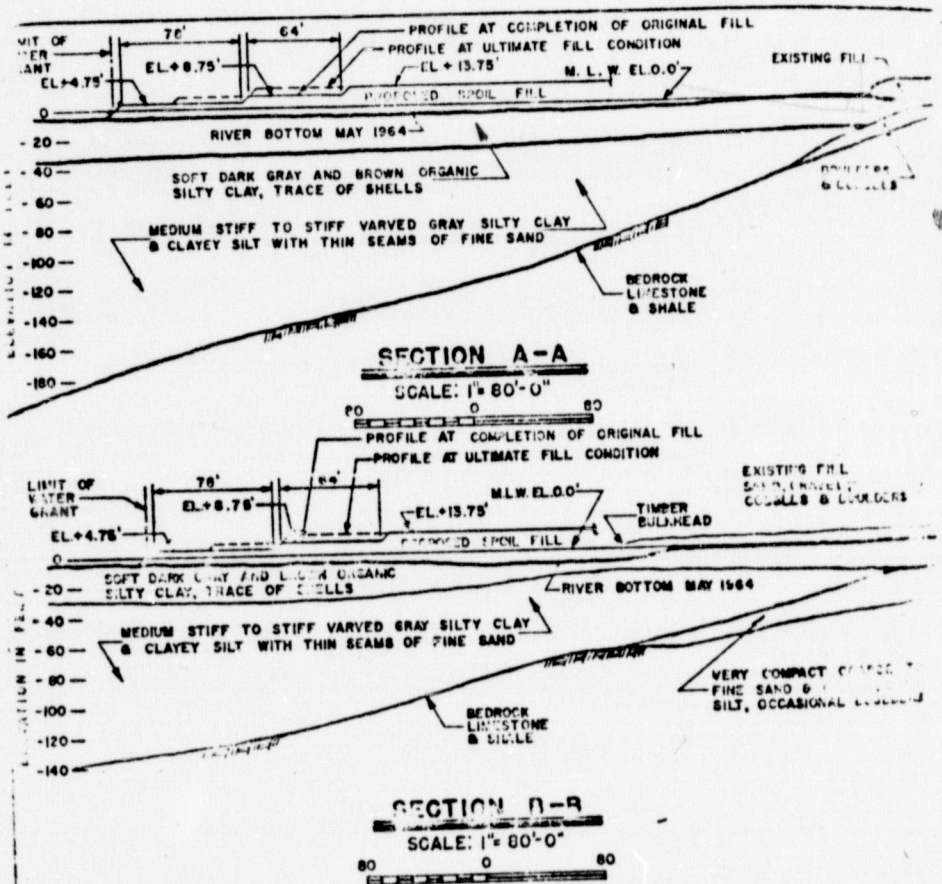
By authority of the Secretary of the Army:

R. T. Rayson
R. T. RAYSON
Colonel, Corps of Engineers
District Engineer

FINATA/RS

Exhibit "E" Annexed to Affidavit of T. Gorman Reilly

1007-24 (Hudson River-Consolidated Edison Co. of N.Y., Inc.-1911 @
Cornwall-on-Hudson)



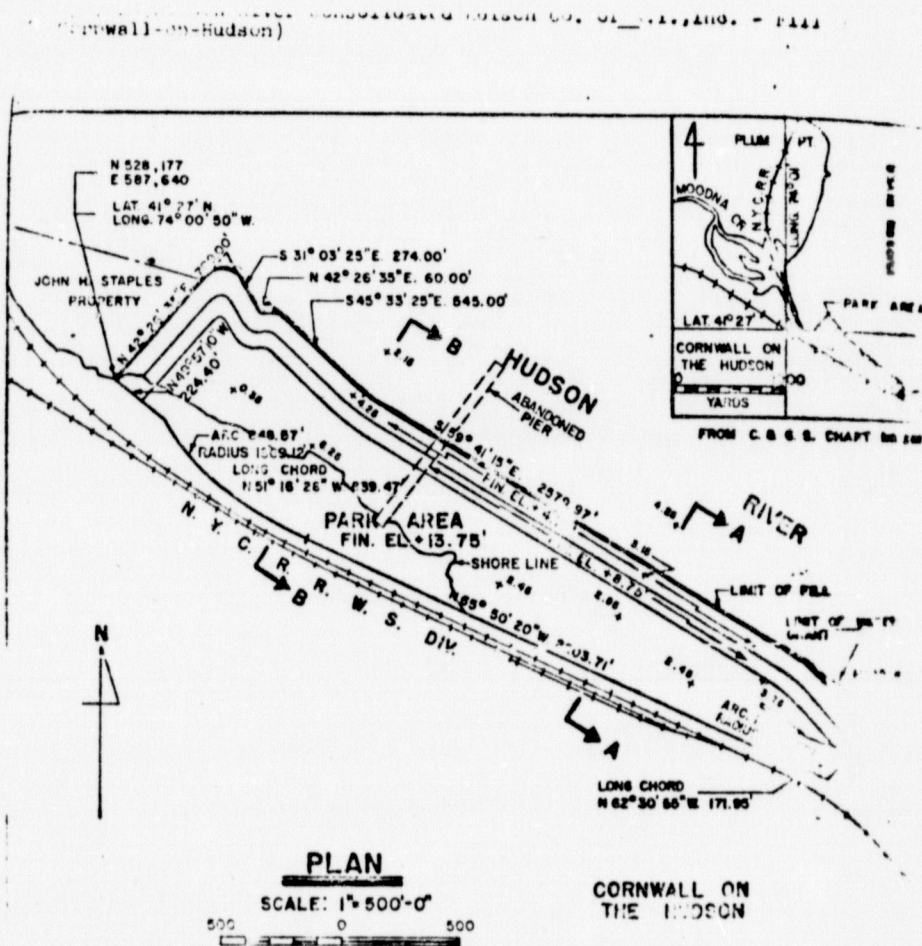
NOTE:

ALL ELEVATIONS REFER TO
HUDSON RIVER DATUM M.L.W.
WHICH IS 1.75' BELOW
1929 U.S.C. & G.S.L.

PROPOSED LOCATION OF PARK AREA
IN HUDSON RIVER
AT CORNWALL ON THE HUNTER
COUNTY LINE, NEW YORK
AND VERMONT

101a

Exhibit "E" Annexed to Affidavit of T. Gorman Reilly



NOTE:

SOUNDINGS AND
ELEVATIONS REFER TO
HUDSON RIVER DATUM M.L.W.
WHICH IS 1.75' BELOW
STANDARD DATUM M.S.L.
AT SANDY HOOK.

PROPOSED LOCATION OF PARK AREA
IN HUDSON RIVER
AT CORNWALL ON THE HUDSON
COUNTY OF ORANGE, NEW YORK
APPLICATION BY T. GORMAN REILLY

TO CONFORM TO
(PRIVATE SYSTEM)

EXHIBIT "F" ANNEXED TO AFFIDAVIT OF
T. GORMAN REILLY

FEDERAL POWER COMMISSION
WASHINGTON 25 20426

June 10, 1966

In reply refer to:
FWR-LP
Project No. 2338-New York
Consolidated Edison Company
of New York, Inc.

Chief of Engineers
Department of the Army
Washington, D. C. 20315

Dear Sir:

Consolidated Edison Company of New York, Inc., on May 31, 1966, filed an amendment to its January 29, 1965, application for license for the Cornwall Pumped-Storage Project No. 2338 to be located on the Lison River in Orange County, New York.

Two copies of the May 31, 1966, application for amendment to the initial application for license, including reduced copies of maps and drawings, are also enclosed for your information and comment, and three sets of prints of the following maps and drawings are being forwarded to you under separate cover:

Exhibit K, Sheet 1 Amended (FPC No. 2338-38)
Exhibit L, Sheets 1 and 1A Amended (FPC No. 2338-39 and -40)

The tracing of Exhibit L, Sheet 1A Amended (FPC No. 2338-40) which, with its amendment, was approved by the Corps in August, 1965, is being forwarded to you at this time under separate cover by registered mail for your approval in accordance with Section 4(c) of the Federal Power Act.

The project as amended, is briefly described in the enclosed letter dated June 3, 1966.

Very truly yours,

J. H. GUINNESS

Secretary

- Enclosures
- 1. FPC Statement dated June 3, 1966
 - 2. FPC and No. 32431 (Two copies of application)
 - 3. FPC tracing - Exhibit L, Sheet 1A Amended (FPC No. 2338-40) u.s.c. by registered mail
 - 4. 75 - 9 prints (u.s.c.)

ONLY COPY AVAILABLE

103a

EXHIBIT "G" ANNEXED TO AFFIDAVIT OF
T. GORMAN REILLY

RECEIVED

DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF ENGINEERS
WASHINGTON, D.C. 20315

29 July 1955

29 July 1955

Chief of State
Federal Power Commission
Washington, D. C. 20425



Mr. Chairman:

Reference is made to the Commission's letter dated 17 June 1955
concerning application for license under the Comprehensive Energy
Act of 1938, P.L. 85-624, for the Hudson River Project No.
1, located on the Hudson River in Orange County, New York.

The plan of the structures affecting navigation is satisfactory,
the project has been approved in accordance with Section 4(e)
of the Federal Power Act insofar as the interests of navigation are
concerned.

The tracing is being returned as requested by registered mail.

Sincerely yours,

S. W. REILLY
Colonel, Corps of Engineers
Assistant Director of Civil Works
for Atlantic Division

cc - O (Reg Mail)

ONLY COPY AVAILABLE

References

3 / 22 1973

Comments:

[illegible][illegible]

JOHN W. FARMER
 Chief, Office of Employees
 Industrial Division

ONLY COPY AVAILABLE

105a

EXHIBIT "T" ANNEXED TO AFFIDAVIT OF
T. GORMAN REILLY

DEPARTMENT OF THE ARMY
U. S. ARMY ENGINEER DISTRICT, NEW YORK
25 FORT PLAZA
NEW YORK, NEW YORK 10007

HANOT-E

16 October 1973

Consolidated Edison Company of
New York, Inc.
ATTN: Mr. Carl L. Moorman, Vice President
4 Irving Place
New York, New York 10003

Gentlemen:

Reference is made to the proposed construction by Consolidated Edison Company of New York of a pumped storage hydroelectric project on the Hudson River at Storm King Mountain, Cornwall, New York.

Further reference is made to Civil Action 73 Civ 4276, United States District Court, Southern District of New York, Scenic Hudson Preservation Conference, et al, against United States of America and Consolidated Edison Company of New York, Inc.

Proposed regulation 33 CFR 209.120 (a) (6), published in Federal Register, 10 May 1973, at page 12218, requires Department of the Army permits under Section 404 of the Federal Water Pollution Control Act, in all cases involving the discharge of dredged or fill material into navigable waters. The proposed regulations provide interim guidance on the processing of permit applications.

Accordingly, confirming telephone advice of 15 October 1973, to your Mr. Richard W. Clement, a Department of the Army permit will be required for work done at the project as provided in the cited regulation.

Sincerely yours,

HARRY W. LYWARD
Colonel, Corps of Engineers
District Engineer

**Notice of Motion (Cross-Motion) for
Summary Judgment**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

S I R S :

PLEASE TAKE NOTICE that upon the amended complaint herein, the affidavits of Albert K. Butzel sworn to October 8, 1973 and October 30, 1973, the motion papers of defendant Consolidated Edison Company for summary judgment herein, the motion papers of defendants Callaway, Lombard and Gribble to dismiss the amended complaint, and upon all the pleadings and proceedings heretofore had herein, plaintiffs will move this Court, Hon. Morris E. Lasker, U.S.D.J., in Room 2903, United States Courthouse, Foley Square, New York, New York, on November 1, 1973 at 3:00 P.M., or as soon thereafter as counsel may be heard, for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, (1) granting the relief demanded in the amended complaint and (2) dismissing the counterclaim and cross-claim of defendant Consolidated Edison Company set forth in its amended answer, and for such other and further relief as this Court may deem just and proper.

107a

*Notice of Motion (Cross-Motion) for
Summary Judgment*

Dated: New York, N. Y.
October 30, 1973

BERLE, BUTZEL & KASS
WINER, NEUBURGER & SIVE
Attorneys for Plaintiffs
425 Park Avenue
New York, New York 10022
Tel.: (212) 838-2700
(212) 421-2150

By ALBERT K. BUTZEL
Albert K. Butzel

[To Attorneys of Record]

**Affidavit of Albert K. Butzel in Support of Cross-
Motion for Summary Judgment and in Opposition
to Motion to Dismiss Amended Complaint**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.,

ALBERT K. BUTZEL, being duly sworn, deposes and says:

1. I am a member of the firm of Berle, Butzel & Kass, one of the attorneys for the plaintiffs herein. I make this affidavit (A) in opposition to the motions of Consolidated Edison Company and defendants Callaway, Gribble and Lombard to dismiss the amended complaint herein, and (B) in support of plaintiffs' cross motion for summary judgment in their favor and to dismiss the counterclaim and cross claim of Con Edison.

2. The pertinent facts which underlie this action and the several motions now pending before this Court are set forth in my affidavit of October 8, 1973, in support of plaintiffs' motion for preliminary relief herein, to which reference is respectfully made. In brief summary of those facts, Con Edison is preparing to commence construction of a pumped storage water power project on the Hudson River near Cornwall, New York (the "Project"). Con Edison has obtained a license for the Project from the Federal

*Affidavit of Albert K. Butzel in Support of Cross-Motion
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to Dismiss Amended Complaint*

Power Commission. However, it has not obtained permits from the Corps of Engineers to undertake dredging and filling operations in the Hudson in connection with the Project. Plaintiffs believe such permits are required under Section 10 of the Rivers and Harbors Act of 1899 [33 U.S.C. §407] and Section 404 of the Federal Water Pollution Control Act Amendments of 1972 [33 U.S.C. §1344] and they accordingly initiated this action seeking (A) a declaratory judgment that such permits are, indeed, necessary, (B) an order directing the Corps of Engineers to enforce compliance with the permit requirements, and (C) an injunction preventing Con Edison from commencing construction of the Project unless and until the permits are obtained. At the same time, plaintiffs moved for a preliminary injunction pending resolution of the case on the merits.

3. Prior to filing their action, plaintiffs had made a demand on the Corps that it hold Con Edison to the applicable permit requirements. In response, the Corps took the position that none were required—either under Section 10 or under Section 404 (Exhibit A to the amended complaint). However, following the filing of the complaint, the Corps reversed itself in part. Thus, while still maintaining that no permits are required under Section 10, *the Corps has recognized that a permit is necessary under Section 404, and so advised Con Edison by letter dated 16 October 1973 [Affidavit of Gorman Reilly, Assistant U. S. Attorney, ¶¶15-16, Exhibit "I"]*.

*Affidavit of Albert K. Butzel in Support of Cross-Motion
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4. Needless to say, the Corps' recognition that a Section 404 permit is required has significantly altered the posture of this case. Thus Con Edison, after initially moving for summary judgment dismissing the amended complaint, has now added a crossclaim against the Corps seeking a declaration that no permits are needed. The Corps, for its part, has moved to dismiss the amended complaint on the grounds that (A) Section 10 permits are not required, and (B) the Section 404 issue is moot. To complete the circle, and in the belief that there are no disputed issues of fact bearing on their claims, plaintiffs are now cross-moving for summary judgment on the grounds that they are entitled to the relief they seek as a matter of law.

5. Turning first to Section 404, plaintiffs' position can be briefly summarized. Under Section 301(a) of the Federal Water Pollution Control Act Amendments of 1972 [33 U.S.C. §1311(a)] (the Amendments in their entirety being hereinafter referred to as the "1972 Amendments"), the discharge of *any* pollutant into the waters of the United States has been made unlawful unless certain permits have been obtained, including, as relevant here, a permit under Section 404. Section 502(6) of the 1972 Amendments [33 U.S.C. §1362(6)] defines pollutant to include, among other things, rock and other kinds of spoil. Section 404, in turn, vests in the Corps, subject to overriding review by the Environmental Protection Agency, the permitting authority and responsibility in respect of the discharge of pollutants [including rock] constituting dredged or fill material.

*Affidavit of Albert K. Butzel in Support of Cross-Motion
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In the instant case, Con Edison has acknowledged that thousands of cubic yards of rock and other fill material will be discharged into the Hudson (and thus into the waters of the United States) in conjunction with the Project. On their face, these proposed operations fall within the prohibitions of Section 301(a) and, as such, clearly appear to require a permit under Section 404. As has been noted, the Corps of Engineers now agrees with this conclusion.

6. Con Edison, needless to say, takes an opposite view. In this connection, it does not claim that the proposed fill operations are different in kind or degree from those referred to in Section 404. The company's position is rather that Section 404 could not have been intended to apply to hydroelectric projects licensed by the FPC.

7. There is, of course, not the slightest reference to any such exemption in Section 404 or any other provision of the 1972 Amendments, nor is there any basis for implying one. To the contrary, as the Corps has noted in its memorandum, the 1972 Amendments had as their basic purpose "to restore and maintain the chemical, physical and biological integrity of our Nation's waters" [33 U.S.C. §1251(a)]. This Congress has sought to accomplish through the Amendments by establishing a *comprehensive* program of controls at the Federal level; and in recognition of its special expertise in the area, the Environmental Protection Agency has been vested with complete authority for

*Affidavit of Albert K. Butzel in Support of Cross-Motion
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the administration of the program "except as otherwise expressly provided in this Act" [33 U.S.C. §1251(d)]. *There is no exception set forth for FPC projects.* However, consistent with the overriding purpose of the 1972 Amendments, EPA is given the *express* authority and, indeed, the responsibility to review proposals for dumping rock and other fill material in the Nation's waters, and to veto such proposals where biological and other environmental impacts would be unacceptable. To suggest under these circumstances, and in the light of the comprehensive purposes and unambiguous language of the 1972 Amendments, including Section 404, that Congress intended to exempt FPC projects from water pollution controls and EPA review is simply an exercise in wishful thinking on Con Edison's part.

8. It is also important to note that, in spite of Con Edison's expansive claims regarding the environmental review that has attended the Project, the FPC never directed itself to the aquatic and related impacts of the proposed dumping operations; nor, for that matter, has any other agency. This is exactly the type of gap that Congress sought to fill in enacting the 1972 Amendments and in vesting EPA with comprehensive authority for administering those Amendments. For Con Edison now to claim that FPC review was sufficient and was so recognized by Congress is not only to read into the 1972 Amendments an exemption that simply is not there—it is to misrepresent the role that the FPC has played. EPA, by contrast, has never

*Affidavit of Albert K. Butzel in Support of Cross-Motion
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had the chance to pass on the Project at all since it did not even exist at the time the FPC issued the license.

9. Con Edison also appears to contend that Section 404 has no independent significance, but follows from, and depends for its effect on, Section 10 of the Rivers and Harbors Act of 1899 (the "1899 Act"). Since the company claims that Section 10 is not applicable to FPC projects, it then reaches for the conclusion that Section 404 does not apply. However, this ignores the fact that the Section 404 permit requirements do not derive from Section 10, but rather from Section 301 of the 1972 Amendments, which prohibits the discharge of any pollutant, including waste rock, into navigable waters unless a permit is obtained under the Amendments (here Section 404). Furthermore, Section 404 is far more comprehensive than Section 10 as regards water impacts and, most critically of all, involves EPA in the review process. This, of course, is a key theme of the 1972 Amendments, but one that seems to have escaped Con Edison completely in its efforts to avoid the applicability of Section 404.

10. The company also contends—half-heartedly—that Section 404 is limited in its coverage to the discharge of dredged spoil. The simple answer to this is that Section 404 refers unambiguously to both dredged *and fill material*, as does the Senate-House Conference Report [Conf. Report No. 92-1236, pp. 141-142]. Furthermore, if any clarification were required, it is provided by Section 502(6) of the

*Affidavit of Albert K. Butzel in Support of Cross-Motion
for Summary Judgment and in Opposition to Motion
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1972 Amendments which includes in its definition of pollutants both dredged spoil and rock.

11. In light of the points noted above and in plaintiffs' other motion papers, it is, we submit, clear beyond peradventure, as the Corps itself has now recognized, that a Section 404 permit is required in this case; and we respectfully submit that this Court should so declare. In this connection, the issue is not, as the Corps would have it, moot. To the contrary, Con Edison continues to claim that no permit is required, and unless declaratory relief is granted, there will be no judicial mandate binding on the company. With all the parties now before the Court, and with the permit requirement in controversy, there would be little logic or justification for deferring the legal resolution of this case.

12. Plaintiffs also seek injunctive relief against Con Edison which is in no way mooted by the Corps' recognition that a Section 404 permit is required. In this connection, the company, through the affidavit of Frank D. McElwee, has stated that it will not begin filling operations until August of 1974. However, assuming this to be true, the Court should not leave Con Edison free to set its own schedule, but should, at the least, enjoin the company from dumping fill materials unless and until the requisite permit is obtained.

13. Plaintiffs further submit that Con Edison should be enjoined from commencing any construction at all unless

*Affidavit of Albert K. Butzel in Support of Cross-Motion
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and until a Section 404 permit is duly obtained. They take this position because, as Con Edison has itself acknowledged, the dumping operations are "essential to accomplish construction of other project features", and it would be "impractical, as a matter of cost . . . to haul this amount of rock by truck through the Village [of Cornwall] to a landfill site." [*McElwee Affidavit*, ¶22]. These statements indicate that the dumping operations are inextricably intertwined with, and, indeed, a *sine qua non* for, the overall construction of the Project. Under these circumstances, to permit Con Edison to proceed generally with construction, when it has not obtained a Section 404 permit for dumping, would be akin to putting the cart before the horse. Furthermore, to the extent that funds are expended before the requisite permit application is filed and reviewed, the inevitable effect will be to alter the equities and, as a practical matter, to restrict the freedom of the Corps and EPA to decide against allowing the dumping. There would, in short, be an irretrievable commitment of resources that could not help but influence the decision.

14. It should also be emphasized that the initial construction activities proposed by Con Edison involve the drilling of an exploratory tunnel and the excavation of rock in connection therewith [*McElwee Affidavit*, ¶15]. According to Con Edison, the excavated rock will initially be placed on land; but even if this is so, the ultimate disposal site is the River. Indeed, the entire initial construction phase is directed to facilitating the dumping of rock

*Affidavit of Albert K. Butzel in Support of Cross-Motion
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[Id., ¶16-17] and, as such, cannot be separated from the dumping itself. For this reason in particular, it is submitted that the riverfront excavation should not be permitted to go forward unless and until a Section 404 permit is obtained.

15. In its motion papers opposing preliminary relief herein and in its crossclaim against the Corps of Engineers, Con Edison has sought to emphasize the amounts that it has already invested in the Project, and the additional costs that it would allegedly incur if it were required to obtain a Section 404 permit. As to this, it is perhaps sufficient to note that Con Edison's quarrel, if any, is with Congress. In addition, however, the Court should be apprised that, insofar as the company claims to have already invested some \$24 million in preparing for the Project's construction, a large portion of that investment was made before the FPC licensed the Project in 1970, and a considerable portion of the balance represents "interest" charged against those earlier expenditures. Thus, contrary to the impression given by Con Edison, \$24 million has not been expended in reliance on the license, but at the company's own risk. Similarly, the additional interest charges accruing on a monthly basis [*McElwee Affidavit*, ¶29] are largely of the company's own making.

16. Con Edison also holds up the spectre of power supply deficiencies if the Project is further delayed. Again, the company's quarrel would seem to be with Congress, but

*Affidavit of Albert K. Butzel in Support of Cross-Motion
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beyond that, the alleged need for the Project is nowhere as great as the company attempts to make it. To the contrary, prior to 1973 Con Edison had not scheduled completion of the Project until 1981—or two years later than it now projects. Furthermore, within the past two weeks, the company's Chairman indicated that other previously-scheduled capacity would not be built because of reduced load projections and certain other factors [Statement of Charles Luce to the Public Service Commission, October 17, 1973]. This is not, in short, a case such as Astoria, where it is too late to make alternative arrangements, nor indeed does the Company so assert [See *McElwee Affidavit*, ¶27].

17. In the light of the facts set forth above, and the clear violations of law that would result if Con Edison proceeds without the requisite Section 404 permit, injunctive relief should, we respectfully submit, be granted in this case.

18. Plaintiffs further submit, on the basis of the facts and arguments set forth in their motion papers for preliminary relief, that permits under Section 10 of the 1899 Act are also required in respect of the Project. In this connection, both the Corps and Con Edison take an opposite view, based largely on the legislative history of the Federal Power Act. However, the analyses do little to explain away the prior administrative practice of the Corps, including the granting of Section 10 permits for the Project at an earlier stage of the proceeding; nor do

*Affidavit of Albert K. Butzel in Support of Cross-Motion
for Summary Judgment and in Opposition to Motion
to Dismiss Amended Complaint*

they deal with the absence of language in the Power Act exempting FPC projects from Section 10. The Corps and Con Edison have both acted in the past with the view that Section 10 applies, and there is nothing that has intervened in the meantime to alter the facts.

WHEREFORE, it is respectfully urged that plaintiffs' cross-motion for summary judgment should be granted, together with the relief prayed for in the amended complaint, and that the motions of Con Edison and the Federal Defendants to dismiss the amended complaint should be denied.

ALBERT K. BUTZEL

(Jurat omitted in printing)

Statement Pursuant to Local Rule 9(g)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

**PLAINTIFFS' STATEMENT OF MATERIAL FACTS AS TO
WHICH IT IS CONTENDED THAT THERE EXIST NO
GENUINE ISSUE TO BE TRIED**

1. Consolidated Edison plans to construct a pumped-storage hydroelectric facility of approximately 2,000 megawatts capacity in and near the Village of Cornwall on the west bank of the Hudson River in Orange County, New York (the "Project").
2. Construction and operation of the Project was licensed on August 19, 1970, by the Federal Power Commission. The License, Opinion and Order is published at 44 F.P.C. 350.
3. In conjunction with the Project, Con Edison intends to undertake various dredging activities in the Hudson, and, in addition, to deposit in the River large amounts of excavated rock and other material.
4. The spoil materials would create new land which, under the current proposal, would ultimately be turned over to the Village of Cornwall for its use as a park. The

Statement Pursuant to Local Rule 9(g)

spoil materials would also cover over significant areas of the River bottom.

5. Con Edison intends to begin construction of the Project in November or December of 1973. The initial construction activities will include the driving of a small exploratory tunnel, to be followed by the excavation of the portal entrance, the construction of a haul road, and, in August 1974, the actual deposit of rock into the Hudson. No dredging activities will be undertaken before March of 1976.

6. Con Edison has not applied for nor does it have a currently effective permit from the Corps of Engineers pursuant to Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. §403) in connection with the Project.

7. Consolidated Edison has not applied for nor has it received a permit from the Corps of Engineers pursuant to Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. §1344) in connection with the Project.

8. Exhibit A to the amended complaint is a true copy of a letter dated March 27, 1973 from Col. Harry W. Lombard, District Engineer, New York District, Corps of Engineers, U.S. Army, to Messrs, Berle, Butzel & Kass.

9. Exhibit 2 annexed to the amended answer of Con Edison is a true copy of a letter dated 16 October 1973, from Col. Harry W. Lombard, District Engineer, New

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Statement Pursuant to Local Rule 9(g)
York District, Corps of Engineers, U.S. Army, to Consoli-
dated Edison Company of New York, Inc.

Respectfully submitted,

BERLE, BUTZEL & KASS

WINER, NEUBURGER & SIVE

Attorneys for Plaintiffs

425 Park Avenue

New York, New York 10022

Tel: 828-2700

By ALBERT K. BUTZEL

[To Attorneys of Record]

Dated: New York, NY

October 30, 1973

Affidavit of James E. DeSista

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

[CAPTION OMITTED]

I, JAMES E. DESISTA, currently employed with the U.S. Army Corps of Engineers, Washington, D. C., do hereby voluntarily make declaration of the following facts under oath duly administered:

1. I currently reside at 8708 Lowell Street, Bethesda, Maryland 20034.

2. I have been employed by the U.S. Army Corps of Engineers since 1936. From 1954 to 1961 I was a member of what is now known as the Regulatory Functions Branch, Operations Division, Directorate of Civil Works. From 1961 to 1969 I was Assistant Chief of this same Branch and from 1969 to present I have been the Chief of the Regulatory Functions Branch. I have general responsibility for overseeing the Regulatory Permits Program administered by the Corps of Engineers. One of my specific duties is to coordinate the Section 10 permit Program of the Corps of Engineers (33 USC 403) and I also have responsibility to oversee applications filed with the Federal Power Commission which are coordinated with the U.S. Army Corps of Engineers pursuant to 16 USC 797, *et seq.*

Affidavit of James E. DeSista

3. The Federal Power Act of 1920, as amended, (16 USC 791, *et seq.*) requires that the construction of non-Federal hydroelectric power facilities which affect the navigable waters of the U.S. be licensed by the Federal Power Commission (FPC). When applications are filed with the FPC for a license to construct hydroelectric power facilities, the FPC refers the application to all interested Federal agencies, including the U.S. Army Corps of Engineers, with a request for comments and recommendations. The applications are referred by the FPC to the Chief of Engineers, U.S. Army Corps of Engineers, as agent for the Secretary of the Army. The Chief of Engineers then refers, in turn, the application to appropriate Corps Division or District offices for the preparation of a report concerning the effects of the project on the statutory responsibility and interest of the Corps. Instructions to the Corps District and Division offices in regard to the investigation for applications for FPC licenses are set forth in ER 1140-2-4 entitled "Work for Other Operations Under the Federal Power Act." A copy of ER 1140-2-4 is attached to this Affidavit as Exhibit A.

4. The preparation of the final response to the FPC, incorporating the Division and District offices views and recommendations, is prepared in the Office of the Chief of Engineers (OCE) and forwarded to the FPC. Opportunities for coordination with various interests is afforded by reason of FPC furnishing a Notice for Application for License to U.S. Congressmen, Federal, State and local agencies, private individuals, publications in local newspapers, and publication in the Federal Register.

Affidavit of James E. DeSista

5. In its response to the FPC, OCE includes recommendations of provisions to be included in the license in order to protect the public interest for which the Corps of Engineers is responsible. In making said recommendations the Corps evaluates the application in a manner similar to that which the Corps of Engineers would do if a private party were seeking a Section 10 Permit (33 USC 403) directly from the Corps of Engineers.

6. Since 1917 the Corps of Engineers has issued regulations implementing its Section 10 Permit authority which are attached to this Affidavit, and I have listed the regulations below:

REGULATIONS	DATE
O&R	1917 (Exhibit B)
O&R (GO #10) (Chapt V)	1 Aug 1929 (Exhibit C)
O&R (Chapt V)	30 Apr 1933 (Exhibit D)
O&R (Chapt V)	4 Feb 1937 (Exhibit E)
O&R (Chapt V)	1 Jan 1940 (Exhibit F)
O&R (Chapt V)	1 Jan 1943 (Exhibit G)
O&R (Pt. II)	1 Mar 1946*
C/Wks, Chapt V	
Operations	

* Copy unavailable. During war years Corps activity was directed only to matters of national defense. Civil regulations were not distributed. Copy may be available in the Corps Archives in St. Louis, Missouri.

Affidavit of James E. DeSista

REGULATIONS	DATE
O&R (Chapt IV)	1 Sep 1947 (Exhibit H)
Pt. II	
Operations	
C/Wks	
O&R (Chapt IV)	15 Oct 1952 (Exhibit I)
Pt. II	
Operations	
C/Wks	
EM 1145-2-303	12 Dec 1958 (Exhibit J)
w/chg 1 & 2	
ER 1145-2-303	18 Mar 1968 (Exhibit K)
w/chg 1-4	
w/chg 1-5**	

** Change 5 was sent to field with news release and letter of 12 May 1970. No official Change 5 was ever released.

7. Since the enactment of the Federal Power Act of 1920, it has been the general policy of the Corps of Engineers not to issue Section 10 Permits for activities on navigable waters which are covered by an application for FPC license. As applications for FPC licenses are coordinated with the Corps of Engineers as outlined above, it has been the policy of the Corps of Engineers to include in the Corps response to FPC all requisite information and recommendations, and hence it has been filed unnecessary to issue a separate Section 10 Permit. This longstanding policy was confirmed in writing in 1968 when ER 1145-2-303 was issued (Exhibit K). Paragraph 6(i) specifically pro-

Affidavit of James E. DeSista

vides that the functions of the Chief of Engineers and the Secretary of the Army to authorize non-Federal water power projects were transferred to the FPC. In the regulations issued since 1920, which I have listed above, there has been no requirement stated in the regulations that the Corps must issue a Section 10 Permit on the same matter for which an application is before the FPC. To do otherwise would be a mere duplication of paper work.

8. However, OCE has delegated the authority to issue permits under its Permit Program to its Division and District Engineers. In the past there have been instances where a District or Division Engineer has issued duplicate permits in connection with FPC projects. Of the approximately 8000 permits issued each year by the Corps of Engineers, I do not know the exact number of permits issued under 33 USC 403 on a matter which was the subject of an FPC pending application, but this duplicate issuance of permits have been relatively few in number. To determine the exact number would require a survey of records of each Corps Division and District office. To the best of my knowledge, there are very few FPC projects in the Corps New York District office and the permits issued on FPC projects by the New York District have been minimal. The issuance of these few permits were made by the local District or Division Engineer under his delegated authority and were not a result of any policy decision or directive from OCE.

JAMES E. DESISTA

Chief, Regulatory Functions Branch
Operations Division
Directorate of Civil Works

(Jurat omitted in printing.)

Supplemental Affidavit of Albert K. Butzel

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

ALBERT K. BUTZEL, being duly sworn, deposes and says:

1. I am a member of the firm of Berle, Butzel and Kass, one of the attorneys for the plaintiffs in this action. I make this affidavit in response to, and in commentary upon, the December 5, 1973 affidavit of James E. DeSistra, Chief of the Regulatory Functions Branch of the U. S. Army Corps of Engineers.

2. Mr. DeSistra's affidavit has presumably been submitted in response to the Court's request that information be provided describing the Corps' pre-1968 policies regarding the issuance of Section 10 permits for projects licensed by the Federal Power Commission. Insofar as the affidavit purports to furnish this information, it is so totally defective as to be worthless.

3. At the outset, in paragraphs 3 through 5 of his affidavit, Mr. DeSistra describes what appear to be the *current* practices of the Corps with respect to FPC license applications. However, this tells us absolutely noth-

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ing regarding the practices of the Corps between 1920 and 1968, and it tells us nothing about the Corps' *Section 10 policies* with respect to FPC projects. Furthermore, the generalized description given by Mr. DeSistra is never shown to have application to the Project in issue here. Thus, while the affidavit claims that,

"In making recommendations [to the FPC] the Corps evaluates the [license] application in a manner similar to that which the Corps of Engineers would do if a private party were seeking a Section 10 permit (33 U.S.C. 407) directly from the Corps of Engineers",

there is not the slightest indication that this practice was followed in the Corps' recommendations and comments on the Storm King Project. To the contrary, the Corps 1963 and 1966 Comment Letters to the FPC [Exhibits A and G to the Affidavit of T. Gorman Reilly sworn to on October 24, 1973] reflect no such evaluation; nor is there anything in the record before the Court showing that the procedures described in Exhibit A to the DeSistra affidavit [ER 1140-2-4] were followed in respect of the Storm King plant.

4. In paragraph 6 of his affidavit, Mr. DeSistra cites the various regulations of the Corps of Engineers which have been issued since 1917 to implement the Corps' Section 10 Permit Authority—and then, without further ado, makes the *bare statement* that "[s]ince the enactment of the Federal Power Act of 1920, it has been the general policy of the Corps of Engineers not to issue Section 10

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Permits for activities on navigable waters which are covered by an application for FPC license." [¶7 of the DeSistra Affidavit]. In purported support of this statement, Mr. DeSistra appears to rely on three assertions:

A. "As applications for FPC licenses are coordinated with the Corps of Engineers *as outlined above*, it has been the policy of the Corps of Engineers to include in the Corps response to FPC all requisite information and recommendations, and hence it has been filed [felt?] unnecessary to issue a separate Section 10 Permit." (emphasis added)

B. "This longstanding policy was confirmed in writing in 1968 when ER 1145-2-303 was issued (Exhibit K). Paragraph 6(i) specifically provides that the functions of the Chief of Engineers and the Secretary of the Army to authorize non-Federal water power projects were transferred to the FPC."

C. "In the regulations issued since 1920 . . . , there has been no requirement stated in the regulations that the Corps *must* issue a Section 10 Permit on the same matter for which an application is before the FPC."

7. In commentary upon the foregoing assertions, it is obvious that none of them support Mr. DeSistra's bare claim regarding the Corps' Section 10 policy since enactment of the Federal Power Act in 1920. Thus, with respect to Assertion A, the "coordination" of which Mr. DeSistra speaks (i.e., "as outlined above") reflects the Corps' *current* practice and, as noted above, this tells us nothing

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about the practice between 1920 and 1968, including the specific procedures followed for the Storm King Project. Similarly, the assertion that paragraph 6(i) of the revised 1968 regulations somehow *confirmed* a long-standing policy of the past is to ignore the language of paragraph 6(i) itself, which begins with two court cases decided *in 1965* and reasons from these that the Corps no longer has the function of "authorizing non-Federal [FPC] water power projects", and that requests for advice accordingly "should be referred" (*not*, "are referred") to the FPC. The language does not speak of past practice, but of new discovery.

8. Finally, with respect to the assertion that in the regulations issued since 1920, "there has been no requirement . . . that the Corps must issue a Section 10 Permit for [FPC projects]," Mr. DeSistra has put the cart before the horse. The regulations from 1917 on have covered all work in navigable waters, *except as otherwise specifically noted*; and until 1968, there was no exception for FPC projects. Thus, if anything, the regulations confirm that pre-1968 policy was to require Section 10 permits for FPC projects. In this connection, it should also be noted that when the Federal Power Act was passed in 1920, the Corps' 1917 regulations (which were then in effect) were not changed and, in fact, remained unchanged until 1929 (and unchanged as related to FPC projects until 1968). Surely if, as Mr. DeSistra claims, the Corps had seen the Federal Power Act as limiting its Section 10 authority in 1920, this limitation would have been recognized and reflected in its regulations long before 1968.

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9. In the concluding paragraph of his affidavit, Mr. DeSistra notes that the Office of the Chief of Engineers has delegated to its Division and District Engineers the authority to issue Section 10 permits and admits that in some cases these Engineers have issued such permits in connection with FPC projects. Yet while disclaiming knowledge of the "exact number" of such permits, Mr. DeSistra states that "this duplicate issuance of permits have [sic] been relatively few in number." [¶8]. But Mr. DeSistra sets forth nothing in support of this claim, nor does he explain how he knows that the instances have been few. To the contrary, in the very next sentence of his affidavit, he states that the checking of District and Division records that would be necessary to determine the number has not been made—even in the New York District. Under these circumstances, Mr. DeSistra's assertions appear to be without factual support.

10. At several points in his affidavit, including in paragraph 8, Mr. DeSistra refers to Section 10 permits for FPC projects as "duplicate permits" or involving duplicate paper work. But such a characterization is refuted in this case itself. As we noted at oral argument, the Section 10 permits issued to Con Edison in 1963 and 1965 (Exhibits C, D and E to the affidavit of T. Gorman Reilly sworn to on October 24, 1973) evidence a far more detailed review by the Corps than its brief comment letters to the FPC, and can hardly be described as duplicative. Following the issuance of these permits, Con Edison amended its plans for the Project, including those involving dredging in the tail-race and dumping at the special site. But no detailed review

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of these amended plans was ever undertaken by the Corps, since no renewed or amended permit applications under Section 10 were ever made.

11. The fact is that throughout his affidavit, Mr. DeSistra has attempted to "establish" the prior policy of the Corps through bare and unsupported statements and unjustified characterizations. The critical question is what did the Corps do between 1920 and 1968 when it came to Section 10 permits for FPC projects. Mr. DeSistra's affidavit provides virtually no information on this. For all his assertions regarding regulations and the like, there are no hard facts describing the Corps' actual practice. We know that Section 10 permits were issued in this case and in others as well, but whether this was the common or the occasional practice is untold. Mr. DeSistra claims it was occasional, but as noted in paragraph 9 above, he offers no facts in support of this bare claim and frankly admits that the review necessary to ascertain the facts has not been made.

12. For the reasons noted above, we submit that the DeSistra affidavit is fatally defective in purporting to establish the pre-1968 policy of the Corps and that supplemental information on the Corps' actual practice is essential if that prior policy is to be understood. Normally, this information might be provided through a further affidavit from the Corps. However, in view of the shortcomings of the initial effort and the importance of an early decision in this case, we suggest that the better procedure would be through the deposition of Mr. DeSistra; and we

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respectively request that the Court direct such an examination at the earliest possible time.

13. The importance of ascertaining the Corps' prior practice is underscored by the legislative history of the Federal Power Act which, contrary to Con Edison's assertions, suggests that the Secretary of the Army's permitting power under Section 10 was not to be removed by the Power Act. Thus, in the House Hearings on the Water Power Act, Mr. Merrill, one of the principal draughtsmen of the Act, noted that the Secretary of War's powers over navigational matters, including "the approval of structures that go across navigable streams, which under the law at the present time are within the joint jurisdiction of the Chief of Engineers of the Army and the Secretary of War," were to be continued; and in clarification a moment later, Representative Hamilton stated:

"The commission acts subject to the powers already vested in the Secretary of War, and those powers are not taken away from the Secretary of War."

To which Mr. Merrill responded that the Secretary's special powers over navigation "were not intended to be taken away". [*Hearings Before House Committee on Water Power* (March 19, 1918), 65th Cong., 2d Sess., at pp. 105-06]. Similarly, at a later point in the hearings, Secretary of Agriculture Houston (who was Mr. Merrill's boss) noted with respect to the Power Act and the continuing responsibilities of the Secretary of War, among others, as follows:

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"If I am not mistaken the provisions in the proposed measure [the proposed Power Act] are more restrictive than existing law, in that they require the assent of three heads of departments *and also the assent of the particular head of the department immediately charged with that Government interest*". [*Ibid.* at 684] (emphasis added).

WHEREFORE, it is respectfully submitted that, insofar as the past policy of the Corps of Engineers is deemed necessary to any determination of the applicability of the Section 10 permit requirements in this case, this Court should direct that, for the purposes of clarifying such past policy, if any, the testimony of Mr. DeSistra be taken by deposition upon oral examination within 20 days hereafter.

ALBERT K. BUTZEL

(Jurat omitted in printing.)

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 4276

SCENIC HUDSON PRESERVATION CONFERENCE, THE HUDSON
RIVER FISHERMEN'S ASSOCIATION, INC., THE SIERRA CLUB
and its ATLANTIC CHAPTER, and THOMAS R. LAKE,

Plaintiffs,

—against—

HOWARD H. CALLAWAY, individually and as Secretary of the
Army, Department of the Defense, U.S.A., LT. GENERAL
WILLIAM C. GRIBBLE, JR., individually and as Chief of
Engineers, Corps of Engineers of the U.S. Army, COLO-
NEL HARRY W. LOMBARD, individually and as District
Engineer, New York District, Corps of Engineers of
the U.S. Army and CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC.,

Defendants.

Appearances:

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LASKER, D.J.

This suit opens the third round of federal litigation involving the controversial Storm King project¹ since approval for its construction was first sought in 1963.² The

¹ *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608 (2d Cir. 1965), cert. denied sub nom. *Consolidated Edison Co. v. Scenic Hudson Preservation Conference*, 384 U.S. 941 (1966) [*Scenic Hudson I*]; *Scenic Hudson Preservation Conference v. Federal Power Commission*, 453 F.2d 463 (2d Cir. 1971), cert. denied, 407 U.S. 926 (1972) [*Scenic Hudson II*].

² Con Ed originally filed its application with the FPC in January 1963. Bergen Affidavit, par. 4(a).

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proposed facility is a pumped storage hydroelectric generating plant of approximately 2,000 megawatts capacity to be constructed by the Consolidated Edison Company ("Con Ed") on the west bank of the Hudson River at Storm King Mountain in the vicinity of Cornwall, New York. It is primarily intended to provide electric power during periods of peak demand for New York City and parts of Westchester County.

The Storm King project was first licensed by the Federal Power Commission ("FPC") in March, 1965. 33 F.P.C. 428. That license, however, was set aside by the Court of Appeals for this Circuit and Con Ed's application was remanded to the FPC for further proceedings. *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608 (2d Cir. 1965), *cert. denied sub nom. Consolidated Edison Co. v. Scenic Hudson Preservation Conference*, 384 U.S. 941 (1966) ["*Scenic Hudson I*"]. Construction and operation of the project, as presently proposed, was licensed on August 19, 1970 (44 F.P.C. 350), and issuance of the license was sustained by the Court of Appeals in October, 1971. *Scenic Hudson Preservation Conference v. Federal Power Commission*, 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972) ["*Scenic Hudson II*"]. Con Ed had intended to begin construction in November or December of this year, but awaits decision of the present motions.

The phase of construction which this case involves concerns excavation or dredging in the Hudson River in order to construct intake facilities for the project's underground powerhouse and deposit or filling of the excavated or

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dredged materials into the Hudson. The latter would create new land along the river which would be conveyed to the Village of Cornwall for use as a park. Plaintiffs, three conservationist organizations and one individual, seek to enjoin these activities unless Con Ed obtains permits for them from the Army Corps of Engineers ("the Corps").

At the outset of the present case, plaintiffs moved for preliminary injunctive relief. Thereafter the Corps and Con Ed cross-moved to dismiss the complaint, the latter also cross-claiming against the former and counter-claiming against plaintiffs for a declaratory judgment that no Corps permits are required. Plaintiffs subsequently moved for summary judgment granting them permanent injunctive and declaratory relief and for dismissal of Con Ed's counterclaim. The parties are agreed that no genuine issue of material fact exists to prevent the disposition of the case by summary judgment on the merits.

Plaintiffs contend that Con Ed is required to obtain permits from the Corps for its proposed activities under two provisions, Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. §403) and Section 404 of the Federal Water Pollution Control Act, as amended in 1972 (33 U.S.C. §1344). They argue that these sections on their face require obtaining permits and that nothing in the acts themselves or in any other act relieves Con Ed of this obligation.

Con Ed maintains that the permit authority of the Corps under the 1899 Act as to hydroelectric projects was removed by the Federal Power Act of 1920, 16 U.S.C. §792 *et seq.*, which vested licensing power over such projects solely in the FPC. As to the 1972 Amendments to the Fed-

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eral Water Pollution Control Act,³ Con Ed argues that the Storm King project is exempt from the permit requirements of §404 of the Act because 1) that section is merely an environmental adjunct to Section 10 of the 1899 Act and applies only to discharges resulting from the dredging of ship channels in navigable waters; 2) Congress did not intend §404 to apply to FPC licensed activities and the proposed Corps regulations under §404 do not in fact apply to such activities; and 3) applying §404 to projects previously licensed by the FPC would violate the "Grandfather" clause (§28) of the Federal Power Act.

The Corps originally granted three permits to Con Ed pursuant to §10 of the 1899 Act. These permits have expired by their own terms and the Corps now maintains that granting them in the first instance was an administrative error since no permit is required under the 1899 Act. As to §404, although at the outset of this suit the Corps took the position that it was inapplicable to the Storm King project, its present posture is that Con Ed is required to seek a permit under that section.

I. Rivers and Harbors Act.

Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. §403, provides:

"The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; . . .

³ The Federal Water Pollution Control Act Amendments of 1972 are hereinafter referred to as "the Amendments" or "the 1972 Amendments."

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and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity . . . of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same."

Con Ed concedes that on its face §10 requires a permit for its proposed activities at Cornwall, but argues that the Federal Power Act has superseded §10 and eliminated any obligations to secure a permit.

The 1920 Federal Water Power Act, which became Part I of the present Federal Power Act,⁴ gave the FPC licensing control over the construction and operation of hydroelectric projects. Specifically, the FPC was authorized

"to issue licenses . . . to any corporation organized under the laws of . . . any State . . . for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction" §4(e), 16 U.S.C. §797(e).

Furthermore, §23 of the Act made it unlawful to construct any hydroelectric plant without an FPC license. 16 U.S.C.

⁴Both the Federal Water Power Act and the Federal Power Act are hereinafter referred to as "the Power Act."

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§817. Since the Storm King project's construction unquestionably falls under the jurisdiction of the FPC, there is no doubt that an FPC license is required for it. Such a license has been obtained and the sole remaining question is whether its acquisition relieves Con Ed of any obligation under the 1899 Act.

Con Ed argues that the Federal Power Act vests *exclusive* jurisdiction over hydroelectric plants in the FPC and denies any other federal agency licensing power over projects within its jurisdiction. It supports this argument by reference to §29 of the Federal Power Act which states that "All Acts or parts of Acts inconsistent with this chapter are repealed." 16 U.S.C. §823. Con Ed submits that Corps licensing of hydroelectric plants under §10 of the 1899 Act is inconsistent with §29 of the Federal Power Act and that the former, to the extent that it applied to hydroelectric plants, has been repealed by the latter. Plaintiffs contend that the statutes are not inconsistent and licenses are required under both.

In the most literal sense, the two Acts are not inconsistent since additional licensing by the Corps does not detract from the licensing power accorded the FPC under §4(e) of the Power Act. Con Ed's argument is more far-reaching, however, since it flows from the alleged over-all purpose rather than any specific provision of the Power Act. The thrust of Con Ed's approach is simply that in enacting the Power Act Congress intended to do away with piecemeal licensing of hydroelectric plants, so that duplicative licensing violates the spirit if not the words of the Act.

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Fortunately, we are not required to speculate in the dark. Both legislative history and judicial interpretation of the Power Act are extensive and leave little doubt that Con Ed's approach more closely accords with the Act than that urged by plaintiffs.

Taking the legislative history first, we note that the House Report discussion of the bill as quoted in Con Ed's brief, states:

"The salient features of the bill herewith reported are the creation of a commission known as the Federal Power Commission, to be composed of the Secretaries of War, Interior and Agriculture. To the Commission are given the powers *heretofore exercised* by the Secretaries in connection with water power development under their several jurisdictions . . . (emphasis added)

"The [Water Power] bill . . . proposes a method by which the water powers of the country, wherever located, can be developed by public or private agencies under conditions which will give the necessary security to the capital invested and at the same time protect and preserve every legitimate public interest. It provides that the administration of water power within Federal jurisdiction, which have hitherto been handled independently by three separate departments [War, Agriculture and Interior] *in order that duplication may be avoided*, that a common policy may be pursued, and that the combined efforts of the three agencies may be directed toward a constructive national program of intelligent, economical utilization of

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our resources". House Rep. No. 61, 66th Cong. 1st Sess., at 5 (emphasis added).

Equally noteworthy is the testimony before the House Water Power Committee by Mr. O. C. Merrill of the Department of Agriculture in which he said:

"The first step in carrying out the purpose of the bill . . . should consist in coordinating the activities of the three departments which have to do with water power in order that *whatever is done by existing agencies may be done under a consistent plan with a definite end in view that there may be no duplication of work, overlapping of functions or conflict of authority.* It is proposed to accomplish this by the creation of a commission composed of the Secretaries of War, Interior and Agriculture" House Water Power Committee Hearings, March 18 to May 15, 1918, 65th Cong. 2d Sess. (emphasis added).

The desire to avoid duplication of administrative effort without destroying the essential authority of a relevant agency is reflected in §4(e) of the Power Act which provides that "no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army." 16 U.S.C. §797(e). If, instead of the interagency cooperation which this proviso mandates, a separate licensing of hydroelectric plants were intended under both Acts, duplication of efforts would result in not one, but two ways. First, two federal agencies

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would be required to license the same project. Second, the same agency (the Corps) would be required both to approve plans submitted to the FPC and to issue a separate permit of its own.

Before turning to a discussion of case law under the Power Act, we note the language of an early interpretation of the Act by the Attorney General. In support of his opinion that the Secretary of Agriculture's authority to approve the transfer of preexisting permits was, by the Power Act, terminated and vested instead in the FPC, the Attorney General said:

"It seems clear that it was the purpose of Congress to bring under this Act all future power development within the jurisdiction of the United States and to concentrate in the hands of the Federal Power Commission all the administrative authority thereover which was in part previously distributed among the Secretaries of the Interior, Agriculture, and War. It is also clear that no further original permits, at least, were thereafter to be issued by the Secretaries. It is believed that practically all the permits issued by them are limited in time; and when they expire new licenses will be issued by the Commission and not by the Secretaries, respectively. It is therefore evident that the intent of the Act, as well as its necessary operation, is to ultimately bring under the new law and under the control of the Federal Power Commission all existing as well as all future developments." 32 Op. Atty Gen. 525, 528 (1921).

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This approach has consistently been validated and adopted by courts faced with the job of interpreting the Act. In *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152, 180 (1946), the Court described the Federal Water Power Act of 1920 in the following words:

"It was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so, instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts and other federal laws previously enacted." See also *United States ex rel. Chapman v. Federal Power Commission*, 345 U.S. 153, 167-68 (1953).

More recently, the Court has said:

"The central purpose of the Federal Water Power Act was to provide for the comprehensive control over those uses of the Nation's water resources in which the Federal Government had a legitimate interest; these uses included navigation, irrigation, flood control, and, very prominently, hydroelectric power—uses which, while unregulated, might well be contradictory rather than harmonious." *Federal Power Commission v. Union Electric Co.*, 381 U.S. 90, 98 (1965).

As the Court of Appeals for the Eighth Circuit stated:

"The various Acts of Congress forming the background for the Federal Water Power Act of 1920, as amended

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by the 1935 Act, are indicative not only of an intention to fully develop the water power resources, and to protect the national interest, but of an intention to centralize the authority over such resources in one Government agency.

• • •

As we view the history of the water legislation, . . . we are forced to conclude that such legislation was designed to vest in the Commission for the future, the control and jurisdiction which Congress had previously exercised." *Northwest Paper Co. v. Federal Power Commission*, 344 F.2d 47, 51-52 (8th Cir. 1965).

Finally, in an earlier case involving the Storm King project itself, the Court of Appeals for this Circuit observed that "[i]n the Federal Power Act Congress granted the Commission 'sweeping authority and a specific planning responsibility.'" *Scenic Hudson II*, 453 F.2d at 467.

In light of this legislative history and judicial gloss, we have no hesitation in holding that the Federal Power Act preempted the Corps' §10 authority to grant permits for the construction of hydroelectric plants such as the Storm King project and vested sole licensing authority in the FPC, to be exercised, when appropriate (as it was here), with the cooperation and approval of the Corps.

The only shadow of doubt on what is otherwise a clear picture is cast by the actions of the Corps itself with regard to Storm King. Although the Corps reviewed both of Con Ed's applications for FPC licenses, as provided in §4(e) of the Power Act, and approved the plans in both instances in 1963 and 1966 (see Exhibits B and G to Affi-

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davit of T. Gorman Reilly), it also issued three permits separately and directly to Con Ed, one in 1963 and two in 1965, approving various aspects of the proposed construction (Exhibits C, D and E to Affidavit of T. Gorman Reilly). If these actions of the New York District Engineer represented an official Corps policy that §10 permits were required for FPC-licensed projects, they would raise serious questions as to preemption by the FPC, since an agency's long-standing interpretation of its own powers carries considerable weight. *Wisconsin v. Illinois*, 278 U.S. 367, 413 (1929); *Guthrie v. Alabama By-Products Co.*, 328 F. Supp. 1140, 1147-48 (N.D. Ala. 1971).

However, the present position of the Corps, expressed in both its current and its proposed regulations, is that no §10 permit is required for an FPC-licensed project. The former states that "the functions of the Chief of Engineers and the Secretary of the Army to authorize non-Federal water power projects . . . were transferred to the Federal Power Commission by the Federal Water Power Act of 1920 (41 Stat. 1063)." 33 CFR §209.120(d)(9). The latter provides that:

"[W]here such structures will affect the navigable capacity of any navigable waters of the United States (as defined in 16 U.S.C. 796), the plans for the dam or other physical structures affecting navigation must be approved by the Chief of Engineers and the Secretary of the Army. In such cases, the interests of navigation should normally be protected by a recommendation to the FPC for the inclusion of appropriate provisions in the FPC license rather than the issuance of a

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separate Department of the Army permit under 33 U.S.C. 401 et seq." 38 Fed. Reg. 12218 (May 10, 1973).

Furthermore, James E. DeSista, Chief of the Regulatory Functions Branch of the Corps, has submitted an affidavit in which he states that no regulation issued since 1920 required the Corps to issue a §10 permit to an FPC-licensed project and that "[a]s applications for FPC licenses are coordinated with the Corps of Engineers . . . it has been the policy of the Corps of Engineers to include in the Corps response to FPC all requisite information and recommendations, and hence it has been filed [*sic*] unnecessary to issue a separate Section 10 Permit" (par. 7). He notes further that authority to issue permits has been delegated by the Corps to its Division and District Engineers and that "there have been instances where a District or Division Engineer has issued duplicate permits in connection with FPC projects" (par. 8). As to these, he states that "[t]he issuance of these few permits were made by the local District or Division Engineer under his delegated authority and were not a result of any policy decision or directive from [the Office of the Corps of Engineers]" (*id.*).⁵

⁵ Plaintiffs argue that the DeSista affidavit does not establish what the policy of the Corps was from 1920 to 1968 (when the current regulation stating that §10 permits would not be required for FPC licensed projects was promulgated), but merely describes current practice and hypothesizes that past practice was similar to it. To the contrary, we agree with defendants that DeSista is describing past as well as present practice and that his long experience in the regulatory branch of the Corps provides an adequate basis for his conclusions. Since this point is in any event a fairly peripheral one, we think no purpose would be served in conducting further discovery on it as requested by plaintiffs.

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We conclude, accordingly, that Con Ed and the Corps are correct that no permit is required under §10 of the Rivers and Harbors Act for construction of the Storm King project.

II. *Federal Water Pollution Control Act.*

Section 404 of the Federal Water Pollution Control Act, as amended, 33 U.S.C. §1344(a), requires a permit for the discharge of "dredged or fill material" into navigable waters. It provides:

(a) The Secretary of the Army, acting through the Chief of Engineers, may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

(b) Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary of the Army (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary of the Army, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 1343(c) of this title, and (2) in any case where such guidelines under clause (1) would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

(c) The Administrator is authorized to prohibit the specification (including the withdrawal of specifica-

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tion) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary of the Army. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection."

Since, as discussed above, Con Ed's activities along the Hudson at Cornwall will entail the discharge of a large quantity of dredged or fill material into the Hudson, the statute on its face requires Con Ed to obtain a permit for its activities. Con Ed has, however, assembled a barrage of arguments against application of the section to its Cornwall project.

First, Con Ed asserts that §404 is merely an environmental adjunct to §10 of the 1899 Act and applies only to dredge and fill discharges resulting from the dredging of ship channels in navigable waters covered by §10. This position is supported neither by the language nor the legislative history of §404 or the 1972 Amendments to the Water Pollution Control Act as a whole.

The stated purpose of the Amendments is "to restore and maintain the chemical, physical, and biological in-

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tegrity of the Nation's waters." §101(a), 33 U.S.C. §1251 (a). Congress set out to accomplish this objective by prohibiting all discharges of pollutants except as specifically provided. Section 301(a) of the Amendments states that except as provided in the Act "the discharge of any pollutant by any person shall be unlawful." §301(a), 33 U.S.C. §1311(a). Under §502(6), the term "pollutant" is defined as including not merely "dredged spoil", but also "rock" and "sand" from any source. 33 U.S.C. §1362(6). Section 404 is one of the exceptions specifically mentioned in §301 (a). Moreover, the conference report on §404 states that "[f]ailure to obtain a permit under this section, or failure to comply with the requirements of such a permit, would be a violation of section 301(a) and enforceable under section 309." 1 Legislative History of the Water Pollution Control Act Amendments of 1972, p. 325 (1973).

Bearing in mind the purpose of the Amendments, a reading of sections 301(a) and 404 indicates that Congress intended to ban outright the discharge of dredged spoil, rock and sand (§§301(a) and 502(6)), unless a permit is obtained under §404 from the Corps with the approval of the Environmental Protection Administrator.

Con Ed asks that we read into this statutory scheme a double exemption. It argues that it is subject neither to the permit requirements of §404, nor to the prohibition of §301 (a). We need not speculate, however, about how Con Ed would avoid the ban of §301(a) if we were to find §404 to be inapplicable, because we find that §404 does apply.

Nothing in the language or history of the statute validates Con Ed's hypothesis that, since the Corps issues permits under both §§10 and 404, the latter must have been

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intended only to require that, in carrying out its supervisory activities over the dredging of ship channels under §10, the Corps would have in mind the environmental goals embodied in the 1972 Amendments. To the contrary, the invalidity of this position is demonstrated by a simple reading of the section, since, if Con Ed's assumption were correct, §404 would prohibit only the discharge of "dredged materials", *i.e.*, materials dredged out of ship channels, whereas by its own terms it covers "dredged and fill materials." To assume that Congress meant nothing by the use of the word "fill" in addition to "dredged" would be unwarranted, especially since the original Amendments referred only to "dredged spoil" (S. 2770, 92d Cong., 1st Sess., §402(m)), "fill" having been subsequently inserted. Con Ed offers no reason for its insertion and we can think of none which supports its assumption that the provision covers only dredged materials and then only materials dredged from ship channels.

A far more difficult point is raised by Con Ed's assertion that Congress could not have intended §404 to apply to hydroelectric power plants because of the comprehensive regulatory power which under the Federal Power Act is to be wielded solely by the FPC. In this context, Con Ed relies on §511(a) of the Amendments which provides:

"This chapter shall not be construed as (1) limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with this chapter." 33 U.S.C. §1371(a).

The argument holds up only if two predicates are valid: 1) Application of §404 to hydroelectric projects would impair

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the authority of the FPC and 2) exercise of exclusive authority by the FPC is not inconsistent with the Amendments. A certain illogic inheres in this position, since the Amendments and the Power Act appear consistent only if the former do *not* diminish the exclusive authority granted by the latter. Con Ed, however, suggests a way out of the apparently sophistic impasse by maintaining that the Power Act and the Amendments are consistent with each other, because under the former the FPC performs all the functions which would be fulfilled by the Corps and the Administrator under the latter.

On closer analysis, this escape route proves to be a dead end street, because although under the Power Act the FPC can perhaps accomplish everything sought by the Amendments, it is not obligated to do so by the Power Act itself. In fact, Con Ed points to no Power Act provision that would require the FPC to satisfy literally or even substantially the demands of §404. On the other hand, §404 conditions discharge of dredged or fill materials on approval by two federal agencies, granted pursuant to specific guidelines designed to protect the environment. Their approval is mandatory under the 1972 Amendments, whereas FPC compliance with §404 would be merely voluntary. To this extent, the Acts are inconsistent.

Regardless of these conclusions, Con Ed would infer an exception from the Amendments for hydroelectric plants on the theory that Congress could not have intended to interfere with the jurisdiction of the FPC in view of the long settled policy, discussed above, of allowing that agency unique control over the production of hydroelectric power.

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The argument is persuasive at first blush, but even more plausible is plaintiffs' contention that Congress would not design an Act which on its face is all-inclusive, but for specifically enumerated exceptions, and yet intend to establish an unmentioned exception of the scale suggested here. Without any indication that Con Ed's reading of the Congressional will is accurate, the carving out of so major an exception would be improper. If this was Congress' intention and the omission is mere oversight, the remedy rests in Congress' hands, and Congress has shown, by its recent Amendments to the Alaska pipeline legislation, that it will not hesitate to remove an obstacle to energy production when it believes a change of requirements is necessary in the public interest.

Con Ed also cites regulations proposed by the Corps, 33 CFR §209.120, 38 Fed. Reg. 12217 (May 10, 1973), as further grounds for its argument that the Power Act's provisions, exclusively, apply to its project. In this it runs counter to the Corps' own interpretation its regulations, which is that, notwithstanding the Power Act, Con Ed is required to comply with §404. Accordingly, Con Ed begins with a strike against it, since an agency's interpretation of its own regulations must be accorded great weight. *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Power Reactor Development Co. v. International Union of Electrical Workers*, 367 U.S. 396, 408 (1961).

The applicable proposed regulation, 33 CFR §209.120(c) (6), reads as follows:

"The Federal Power Act of 1920 (41 Stat. 1063; 16 U.S.C. 791a et seq.), as amended, authorizes the Fed-

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eral Power Commission (FPC) to issue licenses for the construction, operation, and maintaining of dams, water, conduits, reservoirs, powerhouses, transmission lines, and other physical structures of a power project. However, where such structures will affect the navigable capacity of any navigable waters of the United States (as defined in 16 U.S.C. 796), the plans for the dam or other physical structures affecting navigation must be approved by the Chief of Engineers and the Secretary of the Army. In such cases, the interests of navigation should normally be protected by a recommendation to the FPC for the inclusion of appropriate provisions in the FPC license rather than the issuance of a separate Department of the Army permit under 33 U.S.C. 401 et seq. [Rivers & Harbors Act of 1899]. As to any other activities in navigable waters not constituting construction, operation, and maintenance of physical structures licensed by the FPC under the Federal Power Act of 1920, as amended, the provisions of 33 U.S.C. 401 et seq. remain fully applicable. In all cases involving the discharge of dredged or fill material into navigable waters . . . Department of the Army permits under section 404 of the Federal Water Pollution Control Act . . . will be required." 38 Fed. Reg. at 12218.

Con Ed contends that the phrase "In all cases" in the last quoted sentence refers to non-FPC licensed activities as discussed in the preceding sentence. An equally, if not more plausible reading of the phrase would be that it

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means quite simply what it says: that "[i]n all cases involving the discharge of dredged or fill material into navigable waters . . . permits under §404 . . . will be required." *Id.* (emphasis added). This is the meaning put forward by the Corps itself, and we are satisfied that it is correct.

Con Ed further relies on another proposed Corps regulation, 33 CFR §209.120(e), which states:

"1) The provisions of law cited in paragraph (b) of this section [which include §10 of 1899 Act and §404 of the Amendments], requiring Department of Army authorizations, are considered applicable to all structures or work in the navigable waters of the United States except for . . . structures licensed under the Federal Power Act of 1920. . . .

2) In addition, the Department of the Army authorizations will be required for the discharge of dredged or fill material into the navigable waters. . . ." 38 Fed. Reg. at 12219.

Con Ed urges that, in light of subsection (e)(1), subsection (e)(2) applies only to structures not licensed under the Power Act. However, the use of "In addition" in (e)(2) is also consistent with the interpretation urged by the Corps that (e)(2) applies independently of (e)(1), and we accept the Corps' interpretation. Accordingly, we find that compliance with §404 of the Federal Water Pollution Control Act is required under both the Act and the regulations proposed thereunder even of structures licensed by the FPC.

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Con Ed's final argument is that even if this conclusion is correct, §404 cannot apply to a project such as Storm King, which was licensed prior to the passage of the Amendments, because section 28 of the Power Act provides:

"The right to alter, amend, or repeal this chapter is expressly reserved; but no such alteration, amendment, or repeal shall affect any license theretofore issued under the provisions of this chapter, or the rights of any licensee thereunder." 16 U.S.C. §822.

The answer to Con Ed's argument that the 1972 Amendments to the Federal Water Pollution Control Act cannot, because of this section, affect its rights under a previously issued FPC license is that the Amendments are amendments to the Water Pollution Control Act and *not* to the Federal Power Act. The Amendments constitute law of general application which affect FPC licensees no more than any other economic group. We believe that §28 was not intended to insulate FPC licensees from the effect of general Congressional legislation for the term of their licenses, but only to protect them from ex post facto law-making relating specifically to FPC license requirements.

Accordingly, we hold that Con Ed is required by §404 of the Federal Water Pollution Control Act to seek a permit from the Corps for the discharge of dredged or fill materials into the Hudson River, but that it is not required to obtain a permit under §10 of the Rivers and Harbors Act of 1899. Plaintiff's motion for summary judgment granting them declaratory and permanent injunctive relief is granted as to §404 and denied as to §10. Defendants' motions for summary judgment dismissing the com-

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plaint are granted as to the §10 claims and denied as to the §404 claims. Con Ed's motion for summary judgment on its claim for a declaratory judgment that Corps permits are not required is granted as to §10 and denied as to §404.

Submit order on notice.

Dated: New York, New York
December 28th, 1973.

MORRIS E. LASKER
U.S.D.J.

Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 4276

SCENIC HUDSON PRESERVATION CONFERENCE, THE HUDSON
RIVER FISHERMEN'S ASSOCIATION, INC., THE SIERRA CLUB
and its ATLANTIC CHAPTER, and THOMAS R. LAKE,

Plaintiffs,

—against—

HOWARD H. CALLAWAY, individually and as Secretary of the
Army, Department of the Defense, U.S.A., LT. GENERAL
WILLIAM C. GRIBBLE, JR., individually and as Chief of
Engineers, Corps of Engineers of the U.S. Army,
COLONEL HARRY W. LOMBARD, individually and as Dis-
trict Engineer, New York District, Corps of Engineers
of the U.S. Army and CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.,

Defendants.

This action came on for hearing before the Court, Hon-
orable Morris E. Lasker, District Judge, presiding, and
the issues having been duly heard and a decision having
been duly rendered,

It is Ordered, Adjudged and Declared:

1. That defendant Consolidated Edison Company of New
York, Inc. (hereinafter "Con Edison") is not required to
seek or obtain a permit pursuant to §10 of the Rivers and
Harbors Act of 1899 (33 U.S.C. §407) from defendants

Judgment

Callaway, Gribble and Lombard (hereinafter the "Corps of Engineers") in connection with construction of FPC Project No. 2338, known as the Cornwall Project and sometimes called the Storm King Project (hereinafter the "Project"); and

2. That defendant Con Edison is required to seek and obtain a permit from the Corps of Engineers pursuant to §404 of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. §1344) prior to commencing to discharge dredged and fill material into the Hudson River in connection with the construction of the said Project; and

3. That Con Edison is hereby enjoined from discharging dredged or fill material into the Hudson River in connection with the construction of the said Project unless and until such time as a permit has been issued to it by the Corps of Engineers authorizing such discharge as provided by said §404 of the Federal Water Pollution Control Act Amendments of 1972; and

4. At such time as a permit pursuant to said §404 may be issued by the Corps of Engineers authorizing it to discharge dredged and fill material into the Hudson River in connection with the construction of the said Project, the provisions of paragraph 3 of this order shall be deemed to have been satisfied and shall no longer be of force and effect.

MORRIS E. LASKER
U.S. District Judge

Dated: New York, New York
January 4, 1974

Judgment Entered—1-7-74

RAYMOND F. BURGHARDT
Clerk

Notice of Motion to Amend Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of Albert K. Butzel sworn to January 14, 1974, the decision of this Court dated December 28, 1973, and upon all the pleadings and proceedings heretofore had herein, plaintiffs will move this Court, Hon. Morris E. Lasker, U.S.D.J., in Room 2903, United States Courthouse, Foley Square, New York, on Friday, January 25, 1974 at 10:00 A.M., or as soon thereafter as counsel may be heard, for an order pursuant to Rule 59(e) of the Federal Rules of Civil Procedure amending the judgment herein to (1) more precisely define the activities enjoined by said judgment and (2) provide that this Court shall retain continuing jurisdiction in this case, and for such other and further relief as this Court may deem just and proper.

Plaintiffs' proposed form of Amended Judgment is annexed hereto as Exhibit A.

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Notice of Motion to Amend Judgment

Dated: New York, New York

January 14, 1974

BERLE, BUTZEL & KASS

WINER, NEUBURGER & SIVE

Attorneys for Plaintiffs

425 Park Avenue

New York, New York 10022

Tel: (212) 838-2700

(212) 421-2150

By ALBERT K. BUTZEL

[To Attorneys of Record]

Proposed Amended Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

SCENIC HUDSON PRESERVATION CONFERENCE, THE HUDSON
RIVER FISHERMEN'S ASSOCIATION, INC., THE SIERRA CLUB
and its ATLANTIC CHAPTER, and THOMAS R. LAKE,

Plaintiffs,

—against—

HOWARD H. CALLAWAY, individually and as Secretary of the
Army, Department of the Defense, U.S.A., LT. GENERAL
WILLIAM C. GRIBBLE, JR., individually and as Chief of
Engineers, Corps of Engineers of the U.S. Army, COLONEL
HARRY W. LOMBARD, individually and as District Engineer,
New York District, Corps of Engineers of the U.S. Army and
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendants.

This action came on for hearing before the Court, Honorable Morris E. Lasker, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered, Adjudged and Declared:

1. That defendant Consolidated Edison Company of New York, Inc., (hereinafter "Con Edison") is not required to seek or obtain a permit pursuant to §10 of the Rivers and

Proposed Amended Judgment

Harbors Act of 1899 (33 U.S.C. §407) from defendants Callaway, Gribble and Lombard (hereinafter the "Corps of Engineers") in connection with construction of FPC Project No. 2338, known as the Cornwall Project and sometimes called the Storm King Project (hereinafter the "Project"); and

2. That defendant Con Edison is required to seek and obtain a permit from the Corps of Engineers pursuant to §404 of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. §1344) prior to commencing to discharge dredged and fill material into the Hudson River in connection with the construction of the said Project; and

3. That Con Edison and its officers, agents, representatives, employees and all persons in active concert or participation with any of them are hereby enjoined from (A) discharging dredged or fill material into the Hudson River in connection with the construction of the Project, and (B) undertaking any actions or construction activities that would result in the creation of dredged or fill material that would ultimately be discharged into the Hudson in connection with the construction of the Project, unless and until such time as a permit has been issued to Con Edison by the Corps of Engineers authorizing such discharge of dredged or fill material as provided by §404 of the Federal Water Pollution Control Act Amendments of 1972; and

4. That this Court hereby retains continuing jurisdiction over this action for all purposes, including, without limi-

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Proposed Amended Judgment

tation, for the purpose of enabling any of the parties to apply to the Court for such further orders or directions as may be necessary or appropriate, and for the purpose of securing compliance with this judgment.

ENTER :

MORRIS E. LASKER
U.S. District Judge

Dated: New York, N. Y.

January , 1974

**Affidavit of Albert K. Butzel in Support of Motion
to Amend Judgment**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

ALBERT K. BUTZEL, being duly sworn, deposes and says:

1. I am a member of the firm of Berle, Butzel & Kass, one of the attorneys for the plaintiffs herein. I make this affidavit in support of plaintiffs' motion to amend the judgment in this action to (A) more precisely define the activities subject to injunction and (B) provide for this Court's continuing jurisdiction over this action.

2. By decision issued December 28, 1973, this Court held that under Section 404 of the Federal Water Pollution Control Act, as amended (33 U.S.C. §1344) ("Section 404"), Con Edison was required to obtain a permit from the Corps of Engineers before it could discharge any dredged or fill material into the Hudson River in conjunction with the company's proposed Storm King project. Since the plans for the project admittedly contemplate the discharge of thousands of cubic yards of fill material into the River, and since no Section 404 permit had been obtained, the Court granted plaintiffs' motion for summary judgment for "declaratory and permanent injunctive relief . . . as to §404 . . ." (Slip. op., p. 24).

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to Amend Judgment*

3. On January 2, 1974, Con Edison served and filed, upon two days notice of settlement, a proposed form of judgment which limited the scope of injunctive relief to "discharging dredged or fill material into the Hudson River in connection with the construction of the Project". The proposed judgment further provided that the injunction would be deemed to terminate upon the issuance of a Section 404 permit, without regard to validity or invalidity of the permit.

4. On January 3, 1974, plaintiffs submitted a proposed form of counter-judgment which differed in a number of respects from that submitted by Con Edison, including, most importantly, in the scope of injunctive relief. Specifically, plaintiffs' counter-judgment would have enjoined Con Edison from proceeding with any construction work, whether involving discharges or not, until a Section 404 permit was "duly obtained". Plaintiffs submitted this form of judgment because it paralleled the relief sought by their motion for summary judgment, which this Court granted, and on the grounds that *any* construction by Con Edison would prejudice an impartial consideration of a subsequent Section 404 permit application. This Court, however, on January 4, 1974, signed Con Edison's proposed judgment rather than plaintiffs.

5. In seeking broader injunctive relief than Con Edison had proposed in its form of judgment, plaintiffs' recognized that the jurisdiction of the Corps of Engineers under Section 404 extended not to the overall Project, but to the

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discharge of dredged or fill material in connection with its construction. However, it was apparent, based on Con Edison's own affidavits, that the discharge of fill material at the proposed spoil site northwest of the powerhouse was a *sine qua non* for overall construction [*Affidavit of Frank D. McElwee* (Con Edison Project Manager), Oct. 22, 1973, ¶22]. Under these circumstances, plaintiffs believed that to allow the company to proceed to construction when it had not obtained the requisite Section 404 permit would be inappropriate, since, to the extent that funds were expended before a permit application was filed and reviewed, the effect would inevitably be to alter the equities and, as a practical matter, restrict the freedom of the Corps of Engineers and the Environmental Protection Agency to decide against the fill operations. There would in short, be an irretrievable commitment of resources that could not help but influence the decision. Under similar circumstances involving the proposed construction of the Hudson River Expressway, this Court had held that review authority in the Secretary of Transportation could not and should not be frustrated by allowing the Highway to proceed, when to do so would limit the Secretary's ability to reject the proposal [*Citizens Committee to Protect the Hudson Valley v. Volpe*, 302 F. Supp. 1083 (S.D.N.Y., 1969), *aff'd* 425 F.2d 97 (2d Cir., 1970), *cert. denied* 404 U.S. 949 (1971)]; and there have been a number of similar holdings under the National Environmental Policy Act [e.g., *Lathan v. Volpe*, 445 F.2d 1111, 1116 (9th Cir., 1971); *Arlington Coalition v. Volpe*, 458 F.2d 1323 (4th Cir., 1971)].

*Affidavit of Albert K. Butzel in Support of Motion
to Amend Judgment*

6. For the reasons, and on the basis of the authorities, set forth above, plaintiffs continue to believe that an injunction extending to all construction activities would be appropriate in this case. However, they do not ask the Court to so modify its judgment at this point. Instead, they seek an amended judgment, in the form of Exhibit A annexed to the Notice of Motion, that would simply make it clear that Con Edison cannot proceed with construction activities *directly related to the discharge of dredged or fill materials* until a Section 404 permit is obtained, and which would also provide for continuing jurisdiction in the Court should any disputes arise or further relief be required.

7. In the judgment proposed by Con Edison which this Court signed, the sole limitation upon the company is the actual discharging of dredged or fill material into the Hudson. As so written, this means that Con Edison could undertake major excavation, at vast expense, and with tremendous amounts of resulting fill material that could only be disposed of in the Hudson, before a Section 404 permit was obtained. With such fill material a reality, and with the Hudson as allegedly the only "economical" disposal site [*McElwee Affidavit*, ¶22], the consequence of such activities would be to place tremendous pressure on the Corps and EPA to allow the dumping operations, whatever the environmental consequences. This ought not to be allowed.

8. In declining to enjoin *all* Project construction activities until a Section 404 permit is issued, the Court may well have concluded that such a general injunction could not be

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justified given the scope of the Corps' Section 404 jurisdiction. This may be true for construction activities unrelated to the discharge of dredged or fill material, and at this point plaintiffs are prepared to accept such a limitation. Insofar, however, as construction activities are involved which result in the creation of dredged or fill materials (e.g., excavation of the powerhouse entrance or underground chambers), the injunction should cover such activities. In such circumstances, the work involved is directly related to and, indeed, *creates the necessity for*, the fill activities themselves. As such, it should not be permitted until Section 404 certification is obtained lest the consequences described in paragraph 7 otherwise result. And see cases cited in ¶5 above.

9. An Amended Judgment such as that proposed by the plaintiffs would ensure that no work would be undertaken prejudicing a Section 404 decision before that decision itself was made. Thus, the excavation of the tunnel entrance and underground power chambers, with the resulting creation of fill material, would not be allowed unless and until a permit was issued. On the other hand, such an amended judgment would not prohibit Con Edison from initiating construction of major works such as the storage reservoir, or undertaking other construction activities unrelated to the filling operations. Thus, one of the company's principal concerns—that it be able to proceed with construction prior to license expiration in October—would be set to rest. While, as noted before, plaintiffs believe that all construction work could properly have been enjoined, given the interest involved on both sides, and the importance

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of enforcing the legal requirements established by Congress, it is submitted that the form of Amended Judgment proposed hereby would be a fair resolution.

10. By this motion, plaintiffs also propose that the judgment be amended to provide for continuing jurisdiction in this Court. Plaintiffs believe that such a provision is both necessary and appropriate to ensure that the terms of the injunction, whatever its scope, are complied with and to provide a prompt means for review of any ultimate Corps decision, whether positive or negative. As matters stand now, the judgment ends the Court's role, with the possible consequence that any subsequent question as to the scope of the current injunctive language could be *res judicata* unless an appeal were taken now. To avoid this necessity, to provide for future flexibility and to ensure prompt review of the ultimate Corps decision (if any), it is respectfully submitted that the judgment herein should, at the very least, be amended to substitute the revised paragraph 4 of the annexed Amended Judgment for paragraph 4 in the judgment heretofore signed.

11. For all of the reasons set forth above, plaintiffs' motion to amend the judgment herein should be granted, and the form of Amended Judgment annexed to the Notice of Motion as Exhibit A should be signed.

ALBERT K. BUTZEL

(Jurat omitted in printing)

**Memorandum of Defendant Consolidated Edison
Company of New York, Inc. in Opposition to
Plaintiffs' Motion for Amendment of Judgment**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

This memorandum is submitted on behalf of Consolidated Edison Company of New York, Inc. (Con Edison) in opposition to the motion of Plaintiffs (Scenic Hudson) served January 14, 1974, to amend this Court's judgment herein, signed January 4, 1974 and entered January 7, 1974.

The motion, brought pursuant to Rule 59(e), FRCP, contends that the Court's January 4 judgment herein should be amended "to more precisely define the activities subject to injunction", and to "provide . . . continuing jurisdiction" in this Court over the matter (Butzel Affidavit, ¶1).

The motion should be denied.

The January 4th Judgment defines the activities to be enjoined in the precise words of the applicable statute.

The judgment signed by the Court January 4 states:

"That Con Edison is hereby enjoined from discharging dredged or fill material into the Hudson River in connection with the construction of the said Project . . . " (at ¶3).

*Memorandum in Opposition to Plaintiffs' Motion
for Amendment of Judgment*

Section 404 of the Federal Water Pollution Control Act (33 U.S.C.A. §1344) states:

"(a) That the Secretary of the Army, acting through the Chief of Engineers, may issue permits, after notice and opportunity for hearings, for the discharge of dredged and fill material into the navigable waters at specified disposal sites."

This Court's decision of December 28, 1973 states:

"Accordingly, we hold that Con Edison is required by §404 . . . to seek a permit from the Corps for the discharge of dredged or fill material into the Hudson River . . . " (at p. 24).

The injunctive order is consistent word for word with the applicable statute and this Court's decision. It could hardly be more precise.

Scenic Hudson's Amended Judgment is designed to cause confusion, not for precision.

The proposed Amended Judgment would expand the scope of the injunctive order by banning, in addition to discharges,

" . . . any actions or construction activities that would result in the creation of dredged or fill material that would ultimately be discharged into the Hudson in connection with construction of the Project . . . " (at p. 2).

*Memorandum in Opposition to Plaintiffs' Motion
for Amendment of Judgment*

Upon reflection of what, precisely, that wording would enjoin, it appears that:

(1) Excavating and stockpiling rock in connection with construction might, or might not, be a violation, depending on whether the stone in question is "ultimately" intended to be discharged in the Hudson or left on the land.

(2) Preparation of plans or contracting for labor or equipment to excavate rock might be claimed by Scenic Hudson to be a violation, since they would be "actions" which are certainly intended to "create" dredged or fill material for "ultimate" discharge.

(3) Filing and supporting an application to the Corps of Engineers for a §404 permit, itself, would arguably be a violation, since such an application is an "action" that (hopefully) "would result in the creation of . . . material that would ultimately be discharged."

(4) Would counsel's preparation of a brief on the subject be such an "action"?

Precision is not Scenic Hudson's purpose in making this motion. Confusion and endless delay is the obvious objective.

The wording of Scenic Hudson's amended judgment builds in perpetual opportunities for Scenic Hudson to jeopardize the Project construction program, and to harass the Company, its contractors, and even its lawyers.

In its letter transmitting the motion to the Court, Scenic Hudson's counsel says that plaintiff has no policy of endless

*Memorandum in Opposition to Plaintiffs' Motion
for Amendment of Judgment*

delay. In fact, it has no policy of delay at all, says the letter.* If this bit of advocacy were intended seriously, it would have to be concluded that Scenic Hudson has succumbed to the labyrinth of "doublethink" ten years ahead of Orwell's prediction. Scenic Hudson's preference for "Newspeak" has never before been so obvious. In reality, since this Court's decision of December 28, Scenic Hudson has indicated that it will strenuously oppose an application by Con Edison for a §404 permit to the Corps. The objective is clearly to achieve "endless delay".

*There is no basis for the Court
to retain continuing jurisdiction.*

Scenic Hudson further urges the Court to retain continuing jurisdiction both to ensure compliance with its order and to "provide a prompt means for review . . .". Continuing jurisdiction is not necessary, for either of those purposes or for any other. "Federal regulation by injunction

* The letter further states that a newspaper story attributed to Scenic Hudson's Chairman and mentioned in a letter to the Court from Con Edison's counsel "was not merely a misquote but never said at all . . .". The quote, as set forth in Mr. Bergen's January 4 letter to the Court, was: "'We figure we only have to hold on for another 11 months and we'll have won' says Saunders, who has headed the group since the mid-60's. 'Our strategy has always been one of endless delay'" (The Sunday Record, Middletown, New York, December 2, 1973 at p. D-1). The only error in this reference was that the citation to Middletown, New York should be changed to Hackensack, New Jersey. The paper is the Bergen Record, not the Middletown Record. A copy of the paper could be provided to the Court if an issue were to be made of the point. And of course, Con Edison's counsel would also be pleased to cross-examine Mr. Saunders as to Scenic Hudson's strategy, membership, and finances in the event his affidavit is supplied to the Court.

*Memorandum in Opposition to Plaintiffs' Motion
for Amendment of Judgment*

is not desirable, in any event" as Judge Gurfein said in *Citizens for Clean Air v. Corps of Engineers*, 356 F. Supp. 14 (SDNY, 1973). The Federal Rules of Civil Procedure, the Administrative Procedure Act, and the Federal Water Pollution Control Act would appear to be sufficient both to ensure compliance, invoke penalties, if necessary, and provide for prompt review. By retaining jurisdiction in the Court, the Corps' authority and duty will likely become obscured, to no purpose. The Courts, moreover, have plenty to do without voluntarily taking on chores they need not assume.

*The injunction against discharge only keeps
interference with the FPC license to a minimum.*

Scenic Hudson argues, again, that construction work which does not constitute a "discharge" should be enjoined because construction itself, pending the processing of a §404 permit application, might "force" the Corps to issue the permit or cause an unnecessary commitment of resources. This argument, however, ignores the FPC license, upheld by the Second Circuit, which finds the Project is urgently needed in the public interest (*Scenic Hudson Preservation Conference v. FPC*, 453 F.2d 463 (1971)). Con Edison is obliged to go forward under its license (See Mr. Bergen's letter to the Court, January 4, 1974; and Con Edison's Brief of October 23, 1973 at pp. 73-74).

Scenic Hudson's argument amounts to the claim that enactment of §404 suspended Con Edison's rights to construct under its license. If accepted, that argument would lead to the conclusion that §404, which the Court held to be inconsistent with the Power Act (Opinion, p. 19), in fact

*Memorandum in Opposition to Plaintiffs' Motion
for Amendment of Judgment*

amended the Power Act. If so, reconsideration should be given to Con Edison's argument, rejected by the Court, that Section 28 of the Power Act bars application of §404 to this Project. Indeed, whether §404 is general or special legislation, its impact will interfere with mandatory conduct under this license and possibly force termination of the license itself. Congress never had that intent or purpose.

By maintaining the scope of the injunctive order to the terms of the applicable statute and the Corps' express jurisdiction thereunder, the inconsistency between the statutes is at least kept to a minimum.

CONCLUSION

The motion should be denied.

Respectfully submitted,

LEBOEUF, LAMB, LEIBY & MACRAE

By G. S. PETER BERGEN

*Attorneys for Consolidated Edison
Company of New York, Inc.*

One Chase Manhattan Plaza
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Dated: New York, New York
January 21, 1974

Of Counsel

CARL D. HOBELMAN
G. S. PETER BERGEN
ANDREW GANSBERG

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Decision Inscribed on Back of Plaintiffs' Motion Papers

"Motion denied after argument. It is so ordered."

MORRIS E. LASKER
U.S.D.J.

1/28/74

Entered January 29, 1974.

Notice of Appeal

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 4276

SCENIC HUDSON PRESERVATION CONFERENCE, THE HUDSON
RIVER FISHERMEN'S ASSOCIATION, INC., THE SIERRA CLUB
and its ATLANTIC CHAPTER, and THOMAS R. LAKE,

Plaintiffs,

—against—

HOWARD H. CALLAWAY, individually and as Secretary of the
Army, Department of the Defense, U.S.A., LT. GENERAL
WILLIAM C. GRIBBLE, JR., individually and as Chief of
Engineers, Corps of Engineers of the U.S. Army, COLO-
NEL HARRY W. LOMBARD, individually and as District
Engineer, New York District, Corps of Engineers of the
U.S. Army and CONSOLIDATED EDISON COMPANY OF NEW
YORK, INC.,

Defendants.

Notice is hereby given that Consolidated Edison Com-
pany of New York, Inc. (Con Edison), defendant above
named, hereby appeals to the United States Court of Ap-
peals for the Second Circuit from such provisions of the
final judgment entered in this action on the 7th day of
January, 1974, as do require that Con Edison seek and
obtain a permit from the Corps of Engineers pursuant to

Notice of Appeal

§404 of the Federal Water Pollution Control Act Amendments of 1972 (33 USCA §1344) prior to commencing to discharge dredged and fill material into the Hudson River in connection with the construction of the Cornwall Project (FPC Project No. 2338), and as do enjoin Con Edison from discharging such dredged or fill material into the Hudson River in connection with construction of the said Project, unless and until such time as such a permit has been issued to it by the Corps of Engineers authorizing such discharge, which such provisions are specifically paragraphs 2 and 3 of the said final judgment.

Dated: New York, New York

March 4, 1974

LEBOEUF, LAMB, LEIBY & MACRAE

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Notice of Appeal

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Notice of Cross-Appeal

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 4276

SCENIC HUDSON PRESERVATION CONFERENCE, THE HUDSON
RIVER FISHERMEN'S ASSOCIATION, INC., THE SIERRA CLUB
and its ATLANTIC CHAPTER, and THOMAS R. LAKE,

Plaintiffs,

—against—

HOWARD H. CALLAWAY, individually and as Secretary of the
Army, Department of the Defense, U.S.A., LT. GENERAL
WILLIAM C. GRIBBLE, JR., individually and as Chief of
Engineers, Corps of Engineers of the U.S. Army, COLONEL
HARRY W. LOMBARD, individually and as District
Engineer, New York District, Corps of Engineers of
the U.S. Army and CONSOLIDATED EDISON COMPANY OF
NEW YORK, INC.,

Defendants.

Notice is hereby given that Scenic Hudson Preservation
Conference, The Hudson River Fishermen's Association,
The Sierra Club and its Atlantic Chapter and Thomas R.
Lake, plaintiffs above named, hereby appeal to the United
States Court of Appeals for the Second Circuit (A) from
such provisions of the final judgment entered in this action
on the 7th day of January, 1974, as (1) declared that Con-

Notice of Cross-Appeal

solidated Edison Company of New York, Inc. was not required to seek and obtain a permit from the Corps of Engineers pursuant to §10 of the Rivers and Harbors Act of 1899 (33 U.S.C. §403) in connection with the construction of Con Edison's Cornwall Project and (2) limited the scope of injunctive relief granted pursuant to Section 404 of the Federal Water Pollution Control Act Amendment of 1972 (33 U.S.C. §1344) to the actual discharging of dredged or fill material into the Hudson River, and (B) from this Court's denial of plaintiffs' motion to amend the final judgment herein, which denial was entered in this action on January 29, 1974.

Dated: New York, New York

March 7, 1974

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Notice of Cross-Appeal

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